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IN THE

Supreme Court of the United States

OCTOBER TERM, 1928. No. 748.

Harry F. Sinclair, Henry Mason Day, William J. Burns, W. Sherman Burns, Appellants,

v.

United States of America, Appellee.

ON CERTIFICATE FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF ON BEHALF OF UNITED STATES OF AMERICA.

I. APPELLEE'S COUNTER-STATEMENT OF THE CASE.

None of the four separate briefs filed by appellants contains a full and accurate statement of the facts.

Each appellant seeks to put a gloss of innocence and propriety upon those facts which he has elected to state in his brief for his own purposes. It is therefore imperative that all of the facts proved by the Government should be succinctly but comprehensively stated.

Such a statement will enable this Court to understand more readily the rigorous and searching espionage to which the petit jurors in the Sinclair-Fall conspiracy case were subjected by the Burns operatives in the employ of Sinclair. This espionage, which was assigned by the trial judge as one of his reasons for the declaration of a mistrial, commenced in the court room and culminated in (1) a sinister investigation into the financial obligations of juror Kern, (2) active efforts to ascertain the sentiments of juror Kidwell regarding the trial, (3) the fabrication of improper conduct on the part of juror Glasscock in order to provide material for a mistrial or a new trial, and (4) the provoking of a discussion among the jurors on the subject of shadowing and the arousing of the suspicion of juror Herzog in that regard.

A. Employment of Burns operatives.

Shortly after noon on October 18, 1927, in the Supreme Court of the District of Columbia, a petit jury was sworn to try Sinclair and Fall under an indictment for conspiring to defraud the United States (R. 2). The jurors were not kept together,

but were allowed to go to their homes at the close of court each day.

Immediately after the adjournment of court that afternoon (it then having become apparent that the jury would be allowed to disperse) Sinclair returned directly to his apartment in the Mayflower Hotel and stated to his assistant, Day, that he wanted from twelve to fourteen operatives with a lieutenant and a captain sent to Washington by the Wm. J. Burns International Detective Agency in order to cover the jurors in the case (R. 823). Sinclair directed Day to tell one of Sinclair's secretaries in Washington to call up Jeffries, personal secretary of Sinclair and then in charge of his New York office, and ask Jeffries to have one of the Burnses communicate with Day at a place which would be convenient to Day (R. 823). At the same time Sinclair handed Day a list of the jurors containing their respective histories and descriptions (R. 826). Roughly, the history of each juror contained his name and address, his religious persuasion and fraternal affiliations, his business connections, his habits and apparent weaknesses and other data (R. 79-83).

Day thereupon told one of the Washington secretaries of Sinclair to call Jeffries in New York City, and instruct him to have one of the Burnses call Day on the telephone at North 51, which is the telephone number at 2118 Leroy Place, Washington, D. C.—the private residence at which Day was then visiting (R. 824). The call was made; and Jeffries

in turn telephoned W. Sherman Burns at the main office of the Burns agency in New York City and requested him to call Day at the given Washington number (R. 397-98, 775). The telephone conversation between Jeffries and Burns did not last over five or ten seconds (R. 786-87).

W. Sherman Burns immediately called Day in Washington, who said that "this case is about to go along" and that "these people are not locked up and I would like to have them covered" (R. 776). Day was not inclined to discuss matters freely, and Burns did not know at first what Day meant or was talking about (R. 776). Day asked for ten or twelve operatives and made an appointment to meet that night in Washington whomever Burns should put in charge (R. 776, 787). They agreed upon "Jeffries" as the password (R. 786); and Burns told Day that he wanted a man of experience, judgment and discretion to supervise the work (R. 787). The conversation lasted some two or three minutes; and Burns promised to send one of his representatives to Day that evening at nine or ten o'clock (R. 787, 824-25).

Having selected Chas. G. Ruddy, manager of the Burns Agency in Philadelphia, as the man he would put in charge, W. Sherman Burns called Ruddy on the telephone, and asked him to take charge of a surveillance operation in connection with the case "that was going on in Washington" (R. 776-77). Ruddy did not understand what case Burns was talking about; and Burns then told him that "it was

described in the public prints," whereupon Ruddy said he knew what Burns was talking about (R. 777). Burns instructed Ruddy to go to Washington and present himself at the given address at the appointed time to Day from whom Ruddy should take instructions (R. 380, 776-78). Burns asked Ruddy how many men he could supply from the Philadelphia office and stated that he would send Ruddy men from the New York office (R. 380). Ruddy was requested to call back Burns as soon as he had received his instructions from Day regarding the operation (R. 378, 777).

That evening Ruddy proceeded to Washington and, using the name of "Jeffries" by prearrangement, met Day at the Leroy Place address (R. 78-79, 825). Day handed Ruddy the list of jurors which Sinclair had given him that afternoon, and told Ruddy that the jury in the Sinclair-Fall conspiracy case had not been locked up or kept together (R. 79, 825). Day then stated that he wanted Ruddy to place each of the jurors under surveillance and that he wanted twelve to fourteen operatives and a lieutenant in order to "hold" the jurors as closely as possible outside of the court (R. 83, 825). Day further stated that he wanted daily reports from these operatives through Ruddy; and told Ruddy what the case was but did not tell him whom Day was representing (R. 83-84, 825). Ruddy did not know who the client was and thereafter referred to Day as the client (R. 84, 133).

About midnight, Ruddy went to Baltimore where he was met by Charles Veitch, the Burns manager

in that city (R. 84, 378). They proceeded to the Baltimore office of the Burns Agency, from which office Ruddy telephoned W. Sherman Burns at Ossining, New York, and arranged the details of the Washington operation (R. 84, 238). In the course of that conversation Ruddy related to Burns the substance of Day's requirements and they then discussed finances (R. 84). Burns agreed to send money to Ruddy as required (R. 84). Ruddy returned to Washington at 4.30 A. M. (R. 176).

The next morning, October 19, 1927, operatives from the New York, Philadelphia and Baltimore agencies began to arrive in Washington. These operatives had been instructed to report to Ruddy for surveillance work in Washington but were not told in what connection this work was to be done (R. 562, 570, 583). They were met on arrival by Ruddy and his secretary, Robbins, and were broken up as a group and assigned to different hotels according to a list previously prepared by Ruddy and Robbins (R. 84, 110, 121, 138, 169, 237, 238, 245, 382, 385, 398 and 570).

Those operatives who had not left at home their credentials evidencing their connection with the Burns agency, under instructions from their local manager, had their credentials taken away from them (R. 384, 438, 462, 467, 562 and 569). Each operative was given a certain symbol by which he was thereafter designated (R. 86). These working designations are as follows (R. 86):

Operative's Name	*Symbol or Designation*
Steer	S-81
Stewart	S-71
Sullivan	S-70
O'Neill	O-3
Merritt	M-20
Long (McMullin)	L-36
Knowles	K-37
Klein	K-27
Kirby	K-1
Homerighausen	H-4
Dwyer	D-9
Brennan	B-4
O'Reilly	O-14
Robbins	X-12

Each operative was told by Ruddy or Robbins to remain in his hotel room until he heard from Ruddy (R. 100, 128, 238, 241, 243, 246, 249, 253, 254, 262, 547 and 562). He was also told that the operatives were to keep separated, while on this operation; and that they were not to know each other, except when necessary or proper (R. 566).

B. Their instructions and activities during the first week of trial.

Shortly after their arrival, Ruddy assigned a Burns operative to each of the twelve jurors with the exception of Flora, who was described in the history appended to the jury list handed Ruddy by Day as "very bull-headed" and was consequently never

shadowed (R. 80, 85). Ruddy specified each juror by his jury box number and instructed each operative to come down to the court room and pick out his particular juror (R. 85, 112, 121, 128, 140, 145, 154, 171, 242, 246, 438 and 452). The operatives were further instructed by Ruddy to hold under surveillance the jurors as they left the court room until they went home and up to a reasonable hour at night (R. 85), and to report to Ruddy each day (R. 85). Each operative was required to make out a daily handwritten report, which was to be signed by his symbol and not his name (R. 85).

Pursuant to Ruddy's instructions, the operatives came down to the District Court room and got their "spot" on their subjects (R. 140, 239, 245, 250, 259, 267, 269, 270, 279, 439, 452, 474 and 527). Some of the operatives had to wait in line for their turn to get into the court room. Most of the operatives left the courtroom as soon as they had "spotted" their subjects in the jury box from the numbers given them by Ruddy.

The daily reports, which were offered in evidence by the government (Government Exhibits Nos. 10-315, R. 90-370), revealed that before a juror awakened in the morning a Burns operative was in the neighborhood of his home. Each juror was kept under the closest surveillance by an operative from the moment the juror left his house until he arrived in court and the morning session had commenced. During the noon recess of the court, each juror was again

"spotted" as he left the court house and kept under watch during the lunch hour. Frequently, the operatives ate at adjoining tables and all luncheon companions of the jurors were carefully noted.

The reports further revealed that at three thirty P. M., the usual time for the adjournment of court for the day, the operatives were again in readiness and picked up their subjects once more as they left the court room, this time to remain with them during the remainder of the afternoon and evening up to and including the time that the absence of lights in the juror's home indicated that he had gone to bed. This necessitated some subjects being watched until three A. M.

The reports also showed that jurors were followed to their meals, to their churches, to their business appointments, to their places of amusement and to the homes of their friends. Operatives frequently boarded the same street cars as their subjects. Taxicabs were at first used by the operatives for their surveillance; but because taxicabs were too easily spotted, private cars were subsequently rented.

The reports further showed that a careful check was made, insofar as was possible under the circumstances, of everyone who came into contact with a juror at any time during the day or night. This was done pursuant to instructions given Ruddy by Day. Any person entering or coming from a juror's house was carefully observed and an effort was made to learn his identity. Automobiles in which the jurors

rode were noted and their license numbers were duly taken and turned over to operative O'Reilly, who thereupon went to the license bureau and thus ascertained the identity of the owners of such cars. Many of these owners were investigated by the operatives.

The handwritten daily reports of the operatives were collected each day after midnight by O'Reilly, the contact man and lieutenant of Ruddy (R. 159, 266, 284, 302, 316, 403-04). These reports were then edited by Ruddy and typed by Robbins, who served in the capacity of Ruddy's secretary (R. 85, 89, 399). Virtually all of these handwritten reports set forth the fact that the Burns operatives were unable to find any evidence whatsoever that the jurors were being shadowed by anyone else, but this fact was carefully deleted from the edited typewritten reports (R. 241, 250, 257, 261, 265, 267, 282, 315, 440, 475, 573 and 585).

The original handwritten daily reports were never shown to Day (R. 374); but were held by Ruddy until October 29, 1927, and were then forwarded by mail to W. Sherman Burns in New York City (R. 85, 89). They were received in the New York Office of the Burns agency on the morning of October 31st (R. 778).

The edited typewritten reports, however, were daily delivered to Day, commencing October 20th; and were read and discussed each day thereafter by Ruddy and Day (R. 372-73). After looking over the reports

with Ruddy, Day then submitted each day four or five selected reports to Sinclair, and in particular the reports dealing with Kidwell, Kern and Glasscock (R. 826-27).

On Saturday, October 22, 1927, the fifteen Burns operatives met in O'Reilly's room at the Mayflower Hotel between midnight and one A. M., for the purpose of shifting the operatives around from one juror to another (R. 381, 407, 461). This shifting of operatives was for the purpose of preventing "burning," *i. e.*, apprehension of the operative by the subject being shadowed; and was done pursuant to the policy of not keeping one operative constantly on one juror (R. 381-82).

On this same day, operative Kirby rented a room diagonally across from the home of juror Holt in order that he might better observe this juror's home and movements (R. 88, 141, 294, 310, 326 and 574). It appears that Kirby had been anonymously warned to get out of the neighborhood (R. 326).

Money for the Washington operation was largely procured, not from the Washington office of the Burns agency but from the Baltimore office. On three occasions, Veitch, manager of the Baltimore office, came to Washington bringing $500 in cash which he turned over to Ruddy at the Wardman Park Hotel (R. 84, 231). The money so transmitted by Veitch was not the money of the Baltimore agency; but was money sent by W. Sherman Burns from the New York agency with instructions to deliver

it to Ruddy (R. 378, 782). In addition to these sums, Ruddy brought $100 from the Philadelphia agency and received another $200 from the New York agency, making a total of $1,800 (R. 231).

Veitch was never consulted regarding the Washington operation and was never told anything about its nature (R. 378, 782). Likewise, the Washington office was never advised of the operation, and Ruddy never conferred with or got money from it (R. 84, 782).

Besides forwarding the original handwritten reports to W. Sherman Burns, Ruddy sent him weekly statements which showed the amount of time spent, the expenses incurred, and the amount of money advanced to the various operatives employed on the Washington operation (R. 180). On October 26th, Ruddy wrote Burns a letter that read in part (R. 89):

> "Please find enclosed time and expenses for the four men who discontinued. I think it is self explanatory. • • •
>
> "It's been a tough time up to now mainly due to the fact that all interested parties are under an abnormal mental strain and I have had quite a job trying to get them to keep their feet on the ground, however up to now I have succeeded in doing so.
>
> "Will keep you advised from time to time just how things are progressing. • • •"

C. Concentration of the operatives upon jurors Kidwell, Kern and Glasscock during the second week of trial.

All fourteen operatives were kept on duty until Monday, October 24, 1927, on which day Ruddy was told by Day to discontinue the surveillance of the jury as a body and to concentrate the espionage on the three jurors, Kidwell, Kern and Glasscock (R. 86, 388, 828). Accordingly, seven of the operatives were sent home the next day and the remaining seven operatives thereafter confined their attention to the three jurors just named (R. 338, 339, 340, 344, 414).

Some time on that Monday, Ruddy went to Philadelphia (R. 179, 323). His daily report contained the statement that it was "necessary to proceed to Philadelphia to connect with other phases of the case" (R. 179, 323); but Ruddy never disclosed in his testimony just what these phases were or why it was necessary for him to go to Philadelphia in connection therewith. An earlier daily report disclosed that he had called Philadelphia by long distance telephone in connection with the operation on the preceding Friday night around midnight (R. 271).

The history of each of the three jurors, upon whom the operatives concentrated their espionage on and after Monday, October 24th, depicted each juror as living in humble circumstances, as financially not well off and as subject to certain minor vices and weaknesses (Govt. Exh. No. 1, R. 79-83). The activi-

ties of the operatives with respect to each of these three jurors will be considered separately and in turn.

1. Kidwell.

The description of Kidwell in the history attached to the jury list, which Sinclair handed to Day on the afternoon of the opening day of trial, and which Day delivered to Ruddy that night, read as follows (Govt. Exh. No. 1, R. 81):

> "Edward J. Kidwell, Jr., white, age 25, 1637 You Street, S. E., work for Knessi, leather goods, Protestant, organizations none. Single. This young man is the son of Edrans J. Kidwell who for 30 years has been employed (general labor) at St. Elizabeth's Insane Asylum. Juror has a brother who is a barber. Since becoming of age he has worked for Knessi Bros., (Trunks and Leather Goods, 409 7th Street). He was born in Anacostia, D. C. Educational local schools. **As a boy he was pretty wild, drinking and running around with rather a tough crowd. He has quieted down a little now but is still 'a sport'.**"

The foregoing memorandum was compiled from the reports procured by private investigators and credit agencies for George P. Hoover, Esq., one of counsel for Sinclair, and was in Hoover's possession at the time when the jury in the Sinclair Fall conspiracy case was selected (R. 839-40).

On or about Sunday, October 23rd, Sinclair told

Day that it might be a good idea "to find out if Kidwell and Kern were really substantial citizens" (R. 828). Day testified that he too wanted to know more about Kidwell (R. 828). Kidwell was then under surveillance by operative Klein, who had been assigned to this subject at the midnight conference on October 22nd, when all the operatives were shifted around (R. 136, 470). This surveillance was accordingly kept up.

Day had heard that Kidwell had a brother who was a barber (R. 829). This fact also appeared in the history of Kidwell (Govt. Exh. No. 1, R. 81). Day testified that in his estimation barbers are very garrulous; and that he wanted to know whether Kidwell's brother was employed "in any of those shops where he might be promiscuously talking about this trial or in any way expressing **anybody's ideas** about the trial with the clients that might come in" (R. 829). Day further wanted to know whether Kidwell's brother was employed as a barber in any of the prominent Washington barber shops (R. 829).

On Monday, October 24th, Day instructed Ruddy to get a designation on Kidwell's brother; and Ruddy immediately assigned O'Reilly, his contact man and lieutenant, to investigate Kidwell's brother and to start the investigation in the Anacostia section of Washington (R. 87, 162 and 415). O'Reilly went over to Anacostia that day in search of a barber named Kidwell (R. 415).

O'Reilly testified that he found many Kidwells in

the city directory, but that he went directly to 1637 U Street, S. E., at which address the juror Kidwell resided (R. 415-16). Representing himself to be an employee of the District of Columbia Health Department, who was visiting the premises for the purpose of having some papers signed in connection with the barber shop operated by Kidwell, O'Reilly had a brief conversation with the juror's mother, Mrs. Kidwell, during which conversation he inquired if Mr. Kidwell was in, and upon being asked which Mr. Kidwell, he replied "Mr. Kidwell, the barber" (R. 428-29, 506-07). He was then told by Mrs. Kidwell that Mr. Kidwell had his barber shop in the Myrtle Hotel, which O'Reilly knew was reputed to be "a sporting house" (R. 162-63). O'Reilly erroneously assumed that Kidwell the barber was the brother of the juror Kidwell and did not realize that he was in fact the father of the juror (R. 162-63).

The visit of O'Reilly to the Kidwell house was reported to juror Kidwell by his mother that evening (R. 507). The time of the visit was fixed by Mrs. Kidwell as approximately 4:30 or 5 o'clock in the afternoon, whereas juror Kidwell did not reach home that evening until 6 o'clock (R. 507). Mrs. Kidwell also told her husband, the father of the juror, about the visit, when juror Kidwell was present (R. 507).

After leaving the Kidwell home, O'Reilly proceeded to the barber shop in the Myrtle Hotel (R.

416). Upon arriving there, O'Reilly entered the barber shop; and using a suitable pretext, engaged the barber Kidwell in conversation (R. 163, 430). O'Reilly made some inquiries about a person named Stewart and then left the shop (R. 163, 416, 430). He then returned to the Wardman Park Hotel and orally reported to Ruddy (R. 164). Day was standing in the room within four or five feet of O'Reilly and overheard him say that "it was a disreputable barber shop in a disreputable hotel" (R. 164, 829). That night Ruddy spoke to Day about O'Reilly's trip (R. 162); and Sinclair and Day consulted about the inquiries which Day had directed to be made about the barber Kidwell (R. 834).

O'Reilly asserted in his testimony that he did not know he was visiting the house of the juror Kidwell when he called at 1637 U Street, S. E. (R. 430); and that he did not learn this fact until his return to the Wardman Park Hotel that night (R. 430). He further testified that he did not know the initials of juror Kidwell, despite the fact that the city directory contained the names of many Kidwells (R. 416, 430). But the address and initials of Kidwell were correctly given in the history of the juror Kidwell which Ruddy had received from Day on the opening day of the trial; and this history was in Ruddy's possession at the time of O'Reilly's visit.

The testimony of O'Reilly is disproved by his daily hand written report of October 24, 1927, which reads in part as follows (R. 163):

"MONDAY, 10/24/27.

"C. G. R., G. J. R.

"#014.

"N. Y. 5023.

"Subject: Brother of Juror #5, Kidwell.

"Under instructions received from Mgr. C. G. R. I. made an investigation of juror Kidwell's brother.

"I went to the residence address as given, after being unable to obtain any information nearby the house, and interviewed some woman who answered the door.

"By using a suitable pretext and after quite a lengthy conversation, I obtained the following leads.

"The brother of #5 in whom we are interested, is named Edward Kidwell and is the barber maintaining a shop in the Myrtle Hotel on Upper Nichols Ave in a section called Congress Heights.

"I went to this place some distance from the city proper and made inquiry in this neighborhood among those who could give me a line on this barber without arousing suspicion.

"The reputation of the Myrtle Hotel is not so good. This place is called the Myrtle House and commonly called a sporting house."

* * * * * * *

2. *Kern.*

Kern was the other juror, concerning whom Sinclair had said to Day, on or about Sunday, October 23rd, that it would be a good idea to find out if he

was really a substantial citizen (R. 828). The history attached to the jury list described Kern in the following language (Govt. Exh. No. 1, R. 80):—

> "John P. Kern, Age 30, 1315 North Carolina Ave., N. E., salesman for Holmes Baking Co., Protestant, organizations none, married, one child. This juror was born in Washington, a family of bread bakers and bread wagon drivers, his father was a baker (C. Kerns and Sons) (German descent). This boy and his brother have driven bread wagons for Holmes & Sons since becoming of age. He was educated in local schools, grade but not high. **He is quite a sport. Will go to the races whenever he can. Takes a drink and takes a chance on any kind of a bet.** No Government connections. My informant states that he does not think Kern ever served on a jury before."

The Burns operatives had kept juror Kern under strict surveillance from the opening day of trial (R. 113, 151, 556). Ruddy and Day had conversed specifically about him and about the investigation of him (R. 830). Day told Ruddy that he wanted to know something about juror Kern, who did not live up at all to his history; and that he believed that Kern was irresponsible and that he (Day) was very anxious to find out about his responsibility (R. 87, 203, 204, 373, 830). Day further told Ruddy that he was particularly anxious to find out if there was any encumbrance on Kern's property and also if Kern met his financial obligations (R. 87, 204).

On or about October 26, 1927, Day asked Ruddy

what was the best way of finding out how responsible juror Kern was, to which question Ruddy replied "a general credit check" *i. e.*, a check to see whether he owned his own home, whether there were any encumbrances on the property and whether he met his obligations (R. 87, 204). Day and Ruddy agreed that such an investigation should be made regarding the juror Kern (R. 830); and Ruddy thereupon instructed O'Reilly to find out whether juror Kern owned his house and to make a general credit report upon him (R. 88, 421).

During the first week of the trial, Day had asked Britton Brown, a partner in the real estate offices of Randall H. Hagner and Company, where Day could look up a mortgage; and Brown immediately offered the services of his company to Day (R. 389, 390). On October 26, 1927, Day personally went to the office of Hagner and Company and asked for Mr. Brown (R. 391). The latter was not in; and so Day got in touch with Mr. Dove of that company (R. 391), and asked him if there were any encumbrances on Kern's property (R. 391). In consequence of Day's inquiry, Dove had an employee named Anderson investigate the property; and it was discovered that there was a $4,000 trust on the house of juror Kern, which had been materially reduced and was being reduced by payments of $40 a month and which was held by a building and loan association (R. 391, 393, 395, 830-31).

On the 28th day of October, 1927, operative O'Reilly

visited the District Building and the office of the Register of Deeds in order to ascertain what, if any, encumbrances were on the home of the juror Kern and also the identity of the parties holding any such encumbrances (R. 421).

On October 21, 1927, Day directed that the brother of juror Kern should be shadowed in order to ascertain how juror Kern "could be riding around" Washington in automobiles (R. 90, 151, 373, 375, 832). The next morning Ruddy assigned two operatives, Dwyer and Steer, to the duty of trailing the brother, but did not tell them why he was placed under surveillance (R. 292-93, 375, 534, 549-50). Dwyer kept the brother's residence under surveillance but failed to get a designation upon him, which failure was reported to Ruddy the following day (R. 410, 552-53).

Steer made inquiries about juror Kern in the neighborhood of his home and thereby learned from a woman neighbor that Kern's next door neighbor was a Mr. Vogt (R. 91, 321, 536-39, 556). Steer also learned from this woman neighbor that Vogt was employed by the railroad and was reputed to have made a thousand dollars "easy money" some years before for granting favors during an influenza epidemic in handing out permits for preference in the shipping out of bodies (R. 91, 321, 538-39). In consequence of this information, O'Reilly on October 23rd assigned Steer to trail Vogt (R. 409); and thereafter Steer went to Vogt's home in order to get a designation on Vogt (R. 91, 321).

Juror Kern testified that his sister had married a man named "Vogt"; but not the Vogt in question (R. 556-57).

3. *Glasscock.*

Among the operatives brought down by Ruddy from the Philadelphia agency for the Washington operation was McMullin, who had obtained employment with that agency, shortly before the jury espionage began, under the name of Long (R. 614). Upon his arrival in Washington on the morning of October 19, 1927, McMullin was given the designation "L-36" and was assigned to the surveillance of juror Glasscock, whom he trailed without interruption until October 29th, despite the general shifting of all other operatives at the midnight conference on October 22nd (R. 614).

Juror Glasscock was depicted in the history attached to the jury list as follows (Govt. Exh. No. 1, R. 81):—

> "Norman L. Glasscock, 1013 8th Street, N. W., age 47. Rec. Clerk Somerville Co. He is married and they have two children. Been residing at this address for several years. This address is an old frame shack, poor appearance, dirty general condition and in downtown rooming house district. Part of the house is occupied by others. He has been employed by the Thos. Somerville Co., 312 13th Street, N. W., wholesale plumbers supplies, as a receiving clerk at $40 weekly and has been with the firm for 15 or 18 years. **He is said to be**

a big, fat, lazy chap who takes the easy side of life, loves to fish, does a lot of loose talking and cursing, and has no particular political or religious affiliations. He takes no pride in his personal appearance. He and his whole family go down in the country every Sunday in their old car and fish. The records show an old unpaid judgment standing since July 16, 1924, for $12 due the Washington Business Bureau."

On October 19, 1927, Ruddy told McMullin that the jury had been charged by the judge not to talk about the case or read newspaper accounts thereof; and instructed McMullin to put in his daily reports at the very first opportunity the fact that juror Glasscock had been detected reading a newspaper (R. 617). Pursuant to these orders, McMullin handed in a report for October 20th embodying the statement that during the noon recess that day Glasscock had purchased a newspaper in a nearby store and had read the same while walking very slowly towards the court house and had dropped it against a house but a short distance from the court house (R. 122, 263, 617). McMullin admitted the falsity of his report but testified that he had made it at the specific direction of Ruddy (R. 617).

On the morning of October 22nd Ruddy came to McMullin's room in the Harrington Hotel and told McMullin that something had gone wrong in the case the day before and that it looked very bad for Sinclair (R. 618). Ruddy had a list of numbers and told

McMullin to mark down the two numbers U-202 and P-1738, which were automobile license numbers (R. 618). He gave McMullin the description of a man and directed him to put the driver of license number P-1738 (an Oakland roadster) in conversation with juror Glasscock at Potomac Park (R. 618). McMullin stated that he did not know much about the park, to which Ruddy replied that he didn't know much about it either and then instructed McMullin to have the conversation take place at the Potomac Flying Field (R. 618-19).

When Ruddy came into McMullin's hotel room that morning, he had a bunch of papers in his hand (R. 619). Ruddy told McMullin that this stuff would be used for a mistrial, but that in all probability it would not be necessary to use it (R. 619). Ruddy also told McMullin that "Sinclair was going to spend plenty of money to get out of this as he had to"; that Ruddy felt sure that no "Department of Justice agents were trailing these men or shadowing the jury" and that "we had to show the client something" (R. 619).

That evening McMullin handed in a false report to the effect that juror Glasscock had driven to his home at noon that day, followed by a Chevrolet coupe with a license number U-202; and that after work that afternoon, juror Glasscock had been followed home by an Oakland roadster with P-1738 as its license number (R. 123). The false report further stated that juror Glasscock and his family thereafter drove to the Potomac Flying Field where Glasscock

had a conversation for about twenty minutes with the driver of the Oakland roadster (R. 123).

The registration number P-1738, as given by Ruddy to McMullin and incorporated in his report of October 22nd, would indicate that the owner of the Oakland roadster was Horace R. Lamb, Esq., a Special Assistant to the Attorney General of the United States and a graduate of Cornell University as well as Cornell Law School (R. 662-63).

Day testified that he had known Mr. Lamb for some years and also knew from where he came (R. 835). He further testified that he knew why Mr. Lamb had come to Washington and that Mr. Lamb had been proposed for some of Day's clubs in that city (R. 835).

Mr. Lamb testified that on the afternoon of October 22, 1927, he played golf at the Washington Country Club and that his automobile, about the time in question, was in the garage of Aikens' near Rhode Island Avenue (R. 660-61). He further testified that he had never seen juror Glasscock in his life until they were introduced in the office of the United States Attorney during the grand jury investigation that followed the mistrial and the disclosure of the jury espionage (R. 660-61). He also testified that he had never been at the Potomac Flying Field in his life, and that in going to the Washington Country Club on the afternoon of October 22nd he had proceeded there by way of Key Bridge (R. 660-61). The Potomac Flying Field is situated at the south end of Highway Bridge (R. 660-61).

Juror Glasscock was called as a witness by the Government and testified that on the afternoon of October 22nd he remained at his place of employment until a quarter of three at which hour he went home to attend a small birthday party in honor of his eleven year old daughter (R. 660-61). He further testified that he was not at the Potomac Flying Field that afternoon at any time, nor had he ever visited that place (R. 660-61). He confirmed the testimony of Mr. Lamb that they had met for the first time in the United States Attorney's Office during the grand jury proceedings, adding that he had never known of the existence of Mr. Lamb until the time of such proceedings (R. 660-61).

Aikens, the proprietor of the garage in which Mr. Lamb's car was on October 22, 1927, was called to the witness stand by the Government and confirmed Mr. Lamb's testimony that his car had remained there until between 1 and 2 o'clock that afternoon (R. 675-76).

During the second week of trial Mr. Lamb was respectively trailed by operatives O'Reilly, Merritt and Steer, as well as by Ruddy (R. 118, 167-68, 417-21, 478, 540-41); but such espionage disclosed nothing which in any way connected him with the juror Glasscock or any other juror, or with Government counsel.

McMullin had reported on October 19th that juror Glasscock had been in contact with a man driving an automobile with license number P-993 (R. 160). Upon investigation, Ruddy discovered that a man named Burr was the owner of the car, and thereupon

he instructed his contact man and lieutenant, O'Reilly, to make an investigation of Burr (R. 160, 285). Thereafter, operatives Steer and Sullivan were assigned to the duty of trailing Burr who was described as a friend of juror Glasscock (R. 105, 106, 303, 459, 541).

Sullivan attempted on October 22nd to establish contact with Burr; and during the course of the day he twice 'phoned Burr's home, first talking with his wife and later in the day talking with Burr himself (R. 303, 459). The surveillance of Burr continued until October 30th, during which time many efforts were made to establish connections with him (R. 303-04, 317, 387, 460). To that end Sullivan cultivated a man named Simmons, who personally knew Mr. Cafritz, the employer of Burr (R. 303-04, 317, 460).

When Sullivan was assigned to the surveillance of Burr on October 22nd, he was instructed by Ruddy to go out and conduct a character investigation of Burr, to meet him personally and find out just what type of man he was and to discover if he had loose morals, and so forth (R. 463-64). Just what "and so forth" meant appeared from Sullivan's testimony to the effect that he **"wanted to know whether or not he (Burr) was capable of playing with a juror or approaching a juror"** (R. 461).

On October 26, 1927, Ruddy came into McMullin's room at the Harrington Hotel and said that the government had $100,000 to spend on the jury and "Sinclair was going to spend $200,000 on the jury" (R. 620). On Saturday, October 29th, Ruddy as-

signed operatives O'Reilly and Merritt to place juror Glasscock under surveillance (R. 422, 478). That afternoon Merritt purchased a camera to be used in connection with the Washington operation (R. 86, 119, 225, 361, 478 and 479). This purchase was ordered by Ruddy and was made with the knowledge and approval of Day (R. 86, 832).

About noon on October 29th McMullin was told by Ruddy to return to Philadelphia, and was also told that "something was going to break in the case over the weekend" (R. 627). McMullin had previously gone to former Governor Pinchot of Pennsylvania, then in Washington, and confided to him the complete character of the Washington operation (R. 620). In consequence of that conversation, he was taken to the office of Special Counsel in the Transportation Building by Governor Pinchot's secretary, at which office he detailed to Special Counsel the activities of the Burns operatives in the Sinclair-Fall conspiracy case (R. 620).

The espionage was concluded by the service of a search warrant at the headquarters of the operatives in the Wardman Park Hotel on the morning of October 31, 1927, at which time the Government seized the daily reports and other documents pertaining to the Washington operation. On November 2nd a mistrial was declared in the Sinclair-Fall conspiracy case.

D. Efforts of appellants to justify the espionage.

On November 1, 1927, a newspaper man in New York called William J. Burns on the telephone to inquire whether or not he desired to make a statement concerning the Washington operation (R. 745). Burns testified that he had nothing to do with the employment of the Burns operatives by Day, and that this telephone call was his first knowledge of the jury shadowing operation in Washington (R. 745). It appears from the testimony that Burns had retired from active control of the Burns Agency in 1921 upon assuming the position of Director of the Bureau of Investigation of the Department of Justice; and that in recent years his only connection with the agency was financial in the matter of the receipt of $5,200 yearly as its advisor (R. 774-45). It further appears that Burns usually came to the New York office approximately once every two weeks (R. 775).

W. Sherman Burns testified that he did not consult with William J. Burns before accepting the employment by Day for the Washington operation, and did not discuss this employment or operation with Burns until November 1st after the publicity of the seizure of the Burns records (R. 775).

On November 2, 1927, William J. Burns personally 'phoned Thomas Lodge, an attorney in Washington and a former Assistant United States Attorney (R. 738). The object of the call was to avert the notoriety with regard to the Burns Agency emanat-

ing from the proceedings in the United States Attorney's office and before the grand jury (R. 738). That same day W. Sherman Burns was engaged in reading the daily hand written reports of the operatives which had been received in his office from Washington on the preceding Monday, October 31st (R. 778).

On November 3, 1927, the original hand written report of McMullin, dated October 22, 1927, and dealing with the spurious meeting between juror Glasscock and Mr. Lamb at the Potomac Flying Field, was sent down by W. Sherman Burns from New York City to Washington by a special messenger in response to Ruddy's request that the client (*i. e.* Day) and his attorney wished it (R. 778, 784).

McMullin had returned to Philadelphia the previous day in accordance with Ruddy's instructions "to get out of the court house before they could serve a subpoena" on him (R. 622). Ruddy told him to return to Washington the next morning as they were bringing his report of October 22nd down from New York (R. 622). Accordingly, McMullin returned to Washington the next morning in company with Welchans from the Philadelphia agency (R. 622). Welchans and McMullin proceeded to the office of Daniel Thew Wright, Esq., a Washington lawyer, and waited for Mr. Wright's return from court that afternoon at 4 o'clock (R. 622). In the meantime Welchans charged McMullin to keep Mr. Wright from knowing the falsity of the report of

October 22, 1927 (R. 622). Upon his return from court Mr. Wright called Ruddy and it was then decided that McMullin should not make his affidavit regarding the alleged meeting between juror Glasscock and Mr. Lamb, until the three met that evening in Ruddy's apartment in the Wardman Park Hotel (R. 622-23).

That evening Ruddy likewise charged McMullin to keep Mr. Wright from knowing the falsity of the report of October 22, 1927; and told McMullin that Ruddy wanted him to make an affidavit based on the report and there would be nothing more to the case (R. 622-23). Ruddy further told McMullin that William J. Burns wanted the affidavit made for the client and that it would be pretty bad for McMullin if he did not go through with it (R. 623).

Later that evening an affidavit was dictated by Mr. Wright setting forth the alleged facts with regard to the Potomac Flying Field affair (R. 623, 734). Mr. Lodge, the Washington attorney representing William J. Burns, was present at the time and assisted in preparing the affidavit (R. 734, 738). McMullin testified that neither Mr. Wright nor Mr. Lodge knew anything about the false character of the affidavit that they prepared.

After the affidavit had been prepared and executed (Govt. Exh. 352, R. 623-25), Ruddy directed McMullin to get out of Washington right away; and consequently McMullin left for Philadelphia about one o'clock in the morning (R. 625).

The following morning, November 4th, Mr. Lodge presented himself at the chambers of Justice Siddons who had presided at the Sinclair-Fall conspiracy trial and had declared a mistrial in that case (R. 695). Justice Siddons was at that time faced with the duty of taking such action as he deemed appropriate regarding the jury espionage, which was one of the causes for the mistrial (R. 695).

John Fitzpatrick, secretary to Justice Siddons, testified on behalf of the Government that Mr. Lodge on this occasion handed certain affidavits to Justice Siddons, stating that he represented the Burns people and was presenting the affidavits on behalf of the Burnses (R. 695). He further testified that Mr. Lodge used the names "William J. Burns" and "The International Detective Agency"; and that Mr. Lodge told Justice Siddons that the affidavits were for the information of the Justice (R. 695).

The affidavits so handed Justice Siddons by Mr. Lodge were the McMullin affidavit (Govt. Exh. No. 352, R. 623-25), and the affidavit of O'Reilly, the contact man and lieutenant of Ruddy, in the Washington operation. The O'Reilly affidavit was drawn in Ruddy's room at the Wardman Park Hotel on the evening of November 3rd at the time of the preparation of the McMullin affidavit. The O'Reilly affidavit contained the statement that O'Reilly had duly investigated the ownership of the car mentioned in McMullin's daily report of October 22, 1927, as having been driven to the Potomac Flying

Field and that such investigation disclosed that the car was owned by Mr. Lamb, Special Assistant to the Attorney General.

Several days after November 4th, Justice Siddons turned over the affidavits to Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, who duly filed them of record (R. 695).

W. Sherman Burns did not go to his office in New York City on November 4th, but on his return to work on November 5th he found on his desk carbon copies of the McMullin and O'Reilly affidavits, which had been prepared on Thursday night, November 3rd, and had been submitted by Mr. Lodge to Justice Siddons on Friday, November 4th (R. 778-79). The two affidavits had been brought back to the New York office by a Burns operative (R. 778).

On the evening of November 5th, W. Sherman Burns and Ruddy met William J. Burns at the latter's rooms in the Woodward Hotel, New York City, where they had come in order to discuss the Washington operation generally (R. 779). Both Burnses had been previously subpoenaed to come to Washington and appear before the grand jury on the coming Monday morning, November 7th (R. 779).

In answer to a subpoena, William J. Burns appeared before the grand jury in Washington on the morning of November 8th (R. 779); and as he came out of the grand jury room, he conversed with a group of newspaper men standing in the hall outside (R. 673-75). Burns stated to these newspaper men

that the Government had been guilty of the only jury tampering and that affidavits to that effect had been filed (R. 673-75). He further said that on the preceding Friday, November 4th, he had filed with Justice Siddons the two affidavits disclosing what the Government through its agents had done (R. 673-75). Both Edward Duffy, of the Associated Press, and George Derno, of the International News Service testified that William J. Burns used the word "I" in making his statement about the filing of the affidavits (R. 673-75).

McMullin was subpoenaed to appear before the grand jury in Washington on November 9th (R. 626). On Tuesday morning, November 8th, McMullin and Ruddy returned to Washington from Philadelphia by train and were met at the Union Station by William J. Burns, W. Sherman Burns and Robbins, Ruddy's secretary during the Washington operation (R. 625). Ruddy introduced McMullin to both the Burnses, whom he had never met before (R. 625).

William J. Burns said to McMullin that he was glad to meet him, that he was glad to know that McMullin was going to go before the grand jury and that McMullin should stick to his story and affidavit just as Ruddy had previously told him to do (R. 625). Burns further said that he had given out a story to the newspapers that day in which he had told the Government where to get off and had called the Government crooked (R. 625).

The Burnses, Ruddy and McMullin then got in a

taxicab and went to the Washington office of Mr. Lodge in the Columbian Building (R. 625). Going up in the elevator, Ruddy told McMullin to let them do the talking in Mr. Lodge's office (R. 625-26). McMullin was left outside while the others conferred with Mr. Lodge; and after the conference, William J. Burns told McMullin to go over to the grand jury and stick to his story and affidavit and he **"would be well taken care of"** (R. 626). McMullin explained to William J. Burns that he could not identify Mr. Lamb and asked what he should do in case they wanted him to identify the man (R. 626). William J. Burns replied that "That is all right. Nothing in your report indicating that it is Mr. Lamb except the description" (R. 626).

McMullin appeared twice before the grand jury, and again met William J. Burns who assured him for the second time that he would be well taken care of (R. 626). On the afternoon of November 9th, William J. Burns met McMullin at the Union Station and told him to return to Philadelphia and get his car (R. 626). Burns further told McMullin to come back to Washington and go out to the Potomac Flying Field in company with Ruddy and look over the lay of the land (R. 626-27). Burns also instructed McMullin to get a look at Lamb's automobile (R. 627).

Upon his return to Washington, McMullin did not go to the Potomac Flying Field (R. 627). In fact, he has never been to that flying field in his life (R. 627).

McMullin, however, did try to locate Lamb's car and for two days he cruised around the vicinity of the Department of Justice and of Mr. Lamb's home in a vain search to locate the car (R. 627). McMullin was accompanied by operatives Robbins and Stewart during these two days (R. 627).

William J. Burns admitted on the witness stand that he had directed McMullin to go to the Potomac Flying Field but testified that the purpose of this visit was to enable McMullin to find someone who would recognize him as having been there on Saturday afternoon, October 22nd (R. 748). Burns further admitted that McMullin had asked him if McMullin would get in a "jam" over the flying field episode (R. 748). Neither Burns nor Stewart nor Robbins denied that a two day search was made for Lamb's car in order to enable McMullin to identify it.

E. Jurors discuss their espionage.

Although the jurors did not in fact know that they were being followed by operatives of the William J. Burns detective agency, yet the record abounds in instances tending to show that the espionage had penetrated their consciousness.

For instance, juror Kidwell testified that a number of jurors including Herzog, Holmes and Kern had discussed the subject of shadowing in the jury consultation room while the jury had been sent out from the court room during an argument on a question of law (R. 498-99). This conversation lasted for five

or ten minutes, during which other members of the jury came into the room (R. 499, 500). The two women members of the jury, Mrs. Bailey and Miss Heaton, were also present during the time that the subject "of being watched or shadowed or followed" was mentioned or discussed (R. 510-12). There was also a talk between Kidwell and either Miss Heaton or Mrs. Bailey on the subject of keeping out of trouble (R. 510-11).

In addition, juror Herzog testified, in answer to the question whether or not he was aware of being followed, that while not aware, he had a suspicion (R. 559-60). He also testified that while on his way home from court one day, he noticed a car driving slowly in back of him; and that when he stopped at his house, this car stopped on the opposite side of the street (R. 560). In going into his home, Herzog looked around and saw the man sitting in the car (R. 560). Herzog waited for a while and the man still remained in the car (R. 560). Finally Herzog went into his home, and when he came out, he did not notice whether the car was there still or had gone (R. 560).

Juror Herzog further testified that one day during the course of the trial he observed a man hanging about his place of business (R. 560). That man, Herzog believed, was the man subsequently known to him at the beginning of the grand jury proceeding as operative O'Reilly (R. 560).

Operative Knowles, who was shadowing juror

Herzog at the time, related in his report of October 24, 1927, that he saw Herzog talking at the door of a garage with another man (R. 131). Knowles was but a short distance away on the other side of the street (R. 131). Herzog and his companion looked suspiciously at Knowles, and then the companion left the juror, passed by Knowles, observed Knowles closely and returned to the garage (R. 131, 329, 579-80).

Knowles thereupon changed the position of his car (R. 131, 329, 579-80). Once more Herzog's companion looked towards Knowles; and leaving Herzog he passed Knowles and scrutinized the latter very closely (R. 131, 329, 580).

Juror Kidwell testified that he saw on a street car during the course of the trial a man who was afterwards revealed to him as operative Merritt (R. 482, 489, 505). In this regard it is to be noted that operatives repeatedly boarded the same street cars as their subjects (R. 242, 268, 327, 440, 454, 548, 572, 584 and 586).

Kidwell further testified that in coming out of a near-beer saloon on Four and a Half Street during the course of the trial he saw a man afterwards revealed to him as operative Klein (R. 482, 505). The latter was entering the saloon as juror Kidwell was leaving; and Kidwell stayed outside until Klein came out (R. 482, 505). Kidwell then watched Klein cross the street and kept him under observation until he turned up Virginia Avenue (R. 482, 505). Klein

had been assigned at the midnight conference on October 22nd when all the operatives were changed around to keep Kidwell under surveillance (R. 136, 470).

Kidwell also testified that a stranger came up and joined him on a bench at noon recess one day and asked Kidwell for tobacco and sat along side of him for some time (R. 484-86). Kidwell was never able to identify this stranger; nor was Kidwell able to identify another man who stopped him in the court house grounds one day and asked him if admission to the court room could be obtained and then asked what Kidwell thought of the trial (R. 490).

In the daily report of operative O'Neill for Sunday, October 23rd, O'Neill reported that juror Goucher (whom O'Neill was then trailing) knew that he was being followed by a cab containing O'Neill (R. 315-16, 531). The report stated that O'Neill followed Goucher, when the latter left his home in a truck bearing the name of his employer, W. S. Kenworthy; but that the subject turned back, saw the O'Neill cab coming and stopped (R. 315). O'Neill continued past Goucher and turned the corner; but Goucher doubled back on him and was waiting for O'Neill (R. 315-16). Knowing that Goucher knew he was being followed by the cab, O'Neill dropped Goucher and reported to O'Reilly (R. 316). The latter directed O'Neill to resume his trailing and do the best he could (R. 316).

Mrs. Bailey testified that on October 28th she was at the Convention Hall Bowling Alley and there

became aware that certain men were watching and observing her (R. 510-11). The record does not disclose the identity of these men.

Operative Brennan was cautioned by Ruddy to act as if he was crazy in the event that the juror should suspect that Brennan was following him (R. 583).

Operative Merritt, who was detailed to get a designation on Kidwell the barber, revealed in his report of October 25, 1927, that he was in the vicinity of the home of juror Kidwell that evening, when a man came out of a nearby house, got into his car and seemed very much worried about Merritt following him (R. 117). This man finally drove to a police sergeant who was parked in a car two blocks away (R. 117). The police sergeant stopped Merritt and told him that Merritt had been reported as a suspicious character (R. 117). After questioning Merritt very closely and telling Merritt that his instructions were to take in any strangers hanging around after 11 P. M., the police sergeant put Merritt in his car; but after talking to Merritt, he finally put Merritt on a trolley going into town and followed the trolley car for about ten blocks (R. 117). This episode took place shortly after a man answering the description of Kidwell the barber had entered the home of juror Kidwell at 10:30 P. M. (R. 117).

II. ARGUMENT.

A. Preliminary statement.

The primary question raised by this appeal is whether or not the activities of appellants under their jury espionage with the resultant declaration of a mistrial in the Sinclair-Fall conspiracy case, obstructed or reasonably tended to obstruct the due administration of justice so as to justify their conviction of criminal contempt.

This appeal also involves the subsidiary questions of whether William J. Burns was properly convicted of criminal contempt by reason of his knowledge of and connection with the procurement and submission of the false McMullin affidavit after the mistrial; whether the trial judge was justified in refusing to hear evidence of an alleged practice of jury shadowing on the part of Department of Justice agents, which evidence was proffered in exculpation or mitigation of the criminal contempt; whether the trial judge correctly admitted evidence of conversations among the jurors upon the subject of being shadowed; whether the trial judge erred in his rulings on the admissibility of certain other conversations; and whether the trial judge properly refused to dismiss the petition and discharge the rule either at the close of the Government's case or at the conclusion of the evidence.

As there are four separate briefs in this case with separate assignments of error, the Government, in the interest of brevity, will endeavor to group the several arguments and assignments of error, insofar as possible, and make a general response thereto.

B. The jury espionage tended to obstruct and did in fact obstruct the due administration of justice.

Appellants were convicted of criminal contempt under Section 268 of the Judicial Code (U. S. C. A. tit. 28, Sec. 385), which provides:

> "The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority. **Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice,** the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree or command of the said courts."

Before entering upon a discussion of the facts and law upon which their conviction rests, we desire to summarize certain basic principles of the law of criminal contempt that are peculiarly applicable to the present case.

The Government submits that a jury is just as integral a part of a trial court as the presiding judge and is entitled to sit as triers of the facts untrammeled, unfettered, unimpeded and unobstructed by any distraction of any character whatever, and

in particular one provided by the defendant in a criminal case. It also submits that our institutions and our laws require a jury to pass on a case without interference on the part of anyone that serves to obstruct the even flow of justice.

The Government submits that the mere shadowing of a jury is contemptuous, in that whether or not the jury is aware of such fact there is interposed a condition which offers a constant threat to the serenity of mind and freedom from distraction which are the essential privileges of a jury. This principle is largely academic in the present case because the record discloses that the espionage comprised much more than shadowing, and because such espionage penetrated the consciousness of the jurors.

The Government submits that it is contemptuous for a defendant in a criminal case to have members of a juror's family and his friends shadowed, because this condition, if disclosed, possesses potentialities of further distraction of the juror unsanctioned by law.

The Government submits that the visit of a private detective to the home of a juror during the trial is manifestly contemptuous, especially when such visit is but a step in an affirmative attempt to ascertain the sentiments of the juror as reflected in the casual utterances or gossip of his relatives.

The Government submits that it is inherently contemptuous for a defendant in a criminal case to seek through his agents or through his detectives to ascer-

tain the financial status of a juror while the case is still in progress.

The Government submits that the fabrication by detectives in the employ of a defendant of improper conduct on the part of a juror, in order to establish the basis for a mistrial or a new trial, constitutes contempt of court, especially when such fabrication is subsequently embodied in false affidavits filed with the court.

The Government submits that it is inherently contemptuous for a defendant to direct his agents or detectives to meet a personal friend of a juror in order to discover if the friend has loose morals and is susceptible of approaching a juror.

The Government submits that acts are contemptuous if they have a reasonable tendency to obstruct justice.

The Government submits that a prosecution for criminal contempt does not fail simply because the acts complained of were not successful and failed of their object.

The broad scope of Section 268 of the Judicial Code clearly shows that Congress fully intended to punish as contempt of court any conduct that might in any way whatever obstruct or interfere with the free and even flow of justice through the courts. We have found no contempt case under this section involving either the bare surveillance of a petit jury or a jury espionage accompanied with such corrupt activities as are to be found in the present case. However, the absence of such a case

does not require that new law be made in order to cover the present situation. The law, as declared by this Court, is broad enough and vigorous enough to justify the conviction of appellants for criminal contempt.

In the case of

Toledo Newspaper Company, et al. v. United States, 247 U. S. 402 (1918),

the appellant newspaper had published matter, both in the form of newspaper articles and of cartoons, that was highly defamatory of a judge who was then considering an injunction case involving a street railway wrangle in the city of Toledo. The defamatory publications, according to the opinion of this Court, never reached the eyes or the attention of the trial judge, nor were the newspapers carrying such defamatory matters ever circulated in the court room.

The newspaper and others were cited for contempt, were found guilty, and were fined. On appeal, the conviction was affirmed both by the Circuit Court of Appeals for the Sixth Circuit, and also by this Court.

The opinion of Chief Justice White considers exhaustively Section 268 of the Judicial Code and the fundamental propositions of the law of criminal contempt, and concludes therefrom that any act which has a reasonable tendency to obstruct justice constitutes criminal contempt:—

(Page 416.) **"Under the case and the action of the courts below concerning it, nothing further**

would seem to be required to establish the correctness of that action, since no other course, under the statement, is possible compatibly with the sacred obligation of courts to preserve their right to discharge their duties free from unlawful and unworthy influences and, in doing so, if need be, to clear from the pathway leading to the performance of this great duty all unwarranted attempts to pervert, obstruct or distort judgment. Nevertheless, in view of the gravity of the subject, we proceed to consider and dispose of the elaborate arguments pressed to the contrary. They are all embraced by the three following propositions: first, that there was a total want of power in the court to treat the matters charged in the information as a contempt and punish it accordingly, as a result of the provisions of Section 268 of the Judicial Code (embodying the text of the Act of March 2, 1831, 4 Stat. 487); second, that, irrespective of the prohibitions of that act, there was a want of power to abridge the freedom of the press by punishing as for a summary contempt comments made by a newspaper upon matters of public concern; and third, that, whatever be the view of the two former propositions, as there was an entire absence of proof sustaining the ultimate inferences of fact upon which the court based its conclusion, such conclusion was wholly erroneous as a matter of law. We dispose of these propositions under separate headings."

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(Page 421.) **"True, it is urged that, although the matters which were made the basis of the findings were published at the place where the**

proceedings were pending and under the circumstances which we have stated in a daily paper having large circulation, as it was not shown that they had been seen by the presiding judge or had been circulated in the court room, they did and could form no basis for an inference of guilt. But the situation is controlled by the reasonable tendencies of the acts done and not by extreme and substantially impossible assumptions on the subject. Again, it is said there is no proof that the mind of the judge was influenced or his purpose to do his duty obstructed or restrained by the publications and, therefore, there was no proof tending to show the wrong complained of. **But here again not the influence upon the mind of the particular judge is the criterion but the reasonable tendency of the acts done to influence or bring about the baleful result is the test. In other words, having regard to the powers conferred, to the protection of society, to the honest and fair administration of justice and to the evil to come from its obstruction, the wrong depends upon the tendency of the acts to accomplish this result without reference to the consideration of how far they may have been without influence in a particular case.** The wrongdoer may not be heard to try the power of the judge to resist acts of obstruction and wrongdoing by him committed as a prelude to trial and punishment for his wrongful acts."

Appellants devote much time and space in their briefs to lengthy excerpts from the record, from the opinions of the lower courts and from the briefs of counsel in the Toledo case in order to show that

this Court was mistaken in its statement that the defamatory publications had never been brought to the attention of the trial judge. The opinion of this Court rests squarely on the assumption that the trial judge had never read or seen the libellous publications; and it is therefore immaterial what the record in the court below discloses. Besides, the Toledo case is cited by the Government not for its facts but for its declaration of the fundamental principle that any act which reasonably tends to obstruct justice constitutes criminal contempt.

We do not understand that counsel for appellants gainsay this basic proposition of law or contend that the Toledo case did not definitely declare this to be the law. There is, however, a half-hearted attempt in the separate brief of appellant Sinclair to destroy, if possible, the legal effect of the Toledo case by quoting language from the opinion of the Circuit Court of Appeals for the First Circuit in the case of *Coll* v. *United States*, 8 *Fed. (2nd) 20, (1925)*. It is indeed a novel contention that the decision of this Court may be overruled by a subsequent decision of an inferior court.

Many cases are cited by counsel for appellants in a vain endeavor to whittle down and subtract from the criterion of reasonable tendency as laid down in the opinion of the Toledo case. To this end a lengthy treatise upon "proximate causation" is attached to the brief filed on behalf of W. Sherman Burns, just as if "proximate causation" was synonymous with "reasonable tendency." None of the de-

cisions cited by appellants qualifies in any manner whatever the declaration by this Court in the Toledo case that the test for criminal contempt is the reasonable tendency of the acts complained of. Consequently, we deem it unnecessary to discuss these cases in this brief.

Even if this Court had found it necessary to hold that the defamatory newspaper articles had actually reached the trial judge in order to sustain the conviction in the Toledo case, such a finding could not harm the cause of the Government in the present case. There is no lack of proof in the present record to show that the jury espionage had penetrated the consciousness of the jurors despite the oft repeated assertion by counsel for appellants that no juror was ever aware of the surveillance.

The reason why appellants are so eager to demonstrate that the trial judge in the Toledo case had actually seen the libellous newspapers is to find support for their contention that the activities incident to the jury espionage did not reasonably tend to obstruct justice because no Burns operative ever approached, talked with or came in physical contact with any juror. They contend that simple surveillance of a jury without contact or attempted contact cannot constitute contempt of court; and that this is the present case. Such a contention is flatly contrary to the holding of this Court in the Toledo case that the standard for criminal contempt is the reasonable tendency of the offending acts. Appellants evidently seek by this contention to divert attention from the

many non-shadowing but sordid features of the present jury espionage upon which the government chiefly relies in sustaining the conviction below.

Although the activities of appellants and their agents and detectives have been fully set forth in appellee's counter-statement of the case (pp. 1-40, *supra*), yet we find it necessary at this point to restate these activities briefly and discuss them at length. This restatement and discussion will serve the two-fold purpose of (1) showing that the activities reasonably tended to and did in fact obstruct the due administration of justice, because they were largely instrumental in causing the declaration of a mistrial of the Sinclair-Fall conspiracy case on November 2, 1927; and (2) revealing the sinister motives and venal object that underlay the jury espionage.

On October 18, 1927, appellant Sinclair was faced with a most trying and unenviable crisis. That day marked the beginning of his trial on the serious criminal charge of having conspired to defraud the United States. If found guilty, Sinclair might be imprisoned for two years and heavily fined. This Court had previously found in a civil action involving the same facts as the pending criminal suit that Sinclair had covinously procured a fraudulent and illegal lease of Naval Petroleum Reserve No. 3, which lease was consequently cancelled with a heavy award of damages against his oil companies.

This perilous position was the impelling motive for the jury espionage and the resultant criminal contempt. It is not therefore surprising that when some

thing went wrong in the trial for Sinclair and it looked bad for him (R. 618), Sinclair was ready to spend plenty of money ($200,000 if necessary) upon the jury in order to get out of this situation R. 619-20). Having discovered that the jury was not being shadowed by anyone else it is little wonder that Sinclair concentrated his efforts upon those three members of the jury who were living in humble circumstances and were prone to the minor faults and weaknesses of a "sport."

At the adjournment of court on the afternoon of October 22nd Sinclair first learned that the jury were not to be held together throughout the trial, but were to be permitted to return each day to their homes and businesses. Sinclair did not wait long to avail himself of the opportunity thus presented. The moment he reached his hotel from court that afternoon, the machinery was set in motion that brought fifteen Burns operatives to Washington in order to participate in an espionage upon the jury.

The Burns Agency was employed and summoned to Washington in the most circuitous and secretive manner. Sinclair did not employ the Burns operatives, but directed his trusted assistant, Day, to hire them. Consequently Day was at all times known as the client, despite the fact that Sinclair was an old client of the agency and had had many prior dealings with it. This subterfuge was obviously resorted to because it concealed the identity of Sinclair as the employer and because it gave an air of disinterestedness to the employment.

Day did not call the Burns Agency in New York City direct; but pursuant to Sinclair's instructions, a long distance call was put through by one of Sinclair's Washington secretaries to Jeffries, Sinclair's personal secretary in New York, asking the latter to have one of the Burnses call Day in Washington. The Burns Agency, in response to Jeffries' call, did not call Day at Sinclair's apartment at the Mayflower Hotel, from where the original call to New York had been made. The call was put through to a private home in the city of Washington.

The telephone conversation between Jeffries and W. Sherman Burns, of the New York agency, lasted five or perhaps ten seconds; whereas the ensuing conversation between Burns and Day lasted two or three minutes. The language of the latter conversation was so guarded that Day refrained from mentioning either the name of the case or the fact that it was the jurors who were to be covered. The same guarded language is to be found in the subsequent telephone conversation between Burns and Ruddy that resulted in Ruddy being placed in charge of the Washington operation.

The brevity and reserve of these telephone conversations disclose that there must have been some prior arrangement about bringing the Burns agents to Washington. This is rendered more evident by the fact that William J. Burns, the founder of the agency, had spent several days in Washington during the week immediately preceding the trial. It will be remembered that Sinclair and Day came to Wash

ington a week before the trial began and took up their residence at the Mayflower Hotel on October 10th (R. 823).

William J. Burns came here on the 12th and left on the 13th (R. 750). Burns testified that the purport of his visit was to interview officials of the Department of Commerce with regard to a radio station at Sarasota, Florida. He accounted for his time on the 12th and on the morning of the 13th, but his activities during the remainder of that day were not disclosed. He told his client in the radio matter that he was going to his Washington office and could be reached there during the remaining portion of the day (R. 729).

When Ruddy came to Washington on the evening of October 18th, he did not meet Day at Sinclair's apartments in the Mayflower Hotel, but in a private residence at 2118 Leroy Place. When he presented himself at that address and asked for Day, Ruddy gave the alias name of "Jeffries" by prearrangement. Although Day gave Ruddy full instructions, he did not tell Ruddy whom Day was representing, and thereafter Day was referred to as the client.

Late that evening when Ruddy wished to talk with W. Sherman Burns, he did not dare use a telephone in the city of Washington,—even at the Burns Agency in that city. Instead, he went to the Baltimore agency, where long after midnight he telephoned W. Sherman Burns, not at the New York agency, but at Ossining, New York. During this conversa-

tion Burns agreed to send money to Ruddy as required.

The money used in the operation did not come from the Washington office of the agency, nor was it forwarded through that office. The record discloses that the local agency was never consulted and was not aware for an instant of the jury espionage. The money required to finance the Washington operation was brought in currency to Washington by Veitch, manager of the Baltimore office. Veitch made three trips to Washington, bringing $500 in cash each time. This cash was not the money of the Baltimore agency, but was forwarded from the New York agency with instructions to deliver it to Ruddy.

One wonders why the Washington operation was thus cloaked from its inception in secrecy and devious practices, if the espionage was perfectly legal, legitimate and proper, as appellants strenuously urge.

On the morning of October 19th, the Burns operatives began to arrive in Washington. Upon arrival they were deprived of their credentials and of all cards, badges and other indicia of their connection with the Burns Agency; and in lieu thereof, were given symbols by which they were thereafter designated. The operatives were not allowed to remain in a group at any one hotel, but were scattered from the Wardman Park Hotel, on the fringe of the city, through various hotels all the way down to the Union Station. They were instructed to keep separate and not to know each other.

The operatives were required to write daily reports of their work. These reports were not signed by name, but bore the mysterious symbols by which the respective authors were designated. Long after midnight each day these reports were collected from the various hotels at which the operatives were living.

Thus again we see this Washington operation, which appellants term as perfectly legitimate and proper, being carried on with the utmost concealment and with absurd precautionary measures, so that even in event of detection there would be little chance of the Burns Agency's connection becoming known.

Upon being assigned to their respective hotels each operative was instructed to remain in his hotel room until he heard from Ruddy. Shortly thereafter Ruddy assigned a Burns operative to shadow and hold under the closest surveillance each juror except the "very bull-headed" Flora. Ruddy specified each juror by his jury box number and instructed each operative to come down to the court room and there get his "spot" or "designation" upon his subject. In this way the shadowing began in the very court room while the Sinclair-Fall conspiracy case was in progress.

The operatives in many cases stood in line outside of the court room door for hours awaiting an opportunity to get into the court room so that they might scrutinize at close range the particular jurors to whom they had been detailed. Once the subject had been so "spotted," the operative left the court room.

Here was the beginning of this Washington operation, in the very precincts of the court, under the very eyes of the presiding justice. Once the operatives had procured their "spot" or "designation," so that the necessity for their entrance into the court room had passed, they lounged about the front of the court house, or in Judiciary Square, or across the street. The court house and its environs were subjected to a veritable avalanche of Burns operatives.

The scope of the surveillance that thus began in the court room was very broad and all-inclusive. Before a juror awakened in the morning it was customary for a Burns agent to be lurking in the vicinity of his home so that from the moment the juror stepped from his door until he reached the portals of the court house he was under the close observation of a detective. At noon recess he was trailed to and from his lunch. Frequently, operatives ate at the adjoining tables. At the close of the afternoon session of court, operatives were again lying in wait about the court house to follow the jurors as soon as they came out.

They were trailed through the streets of Washington to their businesses, their homes, and their places of amusement. Operatives repeatedly boarded the same street cars with their subjects. Operatives hung about the neighborhood of the juror's home until the darkened lights in the house revealed the probability that the juror had gone to bed. On many occasions the vigilance of the operatives did not cease until the small hours of the morning. One operative even went so far

as to hire a room in the neighborhood in order that he might better observe his subject. The surveillance was not relaxed on Saturday afternoons and Sundays, but the jurors were followed on their excursions, on their social activities, and even to their churches.

The espionage upon the jury continued in this manner during the first week of trial. Such espionage disclosed that the jurors were not being shadowed by any other party. Having thus gained this most important information, there was a radical change in the activities of the Burns operatives during the second week of the trial. Before taking up their malignant and mercenary concentration upon the three weak members of the jury, let us pause in order not only to consider and refute the fictitious reason assigned by appellants for the jury espionage, but also to show the real purpose and object thereof.

Sinclair in his testimony and in his sworn answer to the petition for contempt described certain malevolent influences which he feared would prevent him from having a fair and just trial by a jury of his peers. He stated that he entertained the greatest apprehension by reason of the fact that the jury was permitted at the close of each court day to disperse, to go to various parts of the city and to remain away from the control and supervision of the court each night. Accordingly, Sinclair and the other appellants urged on the court in their sworn answers, in their testimony, in their arguments, and in the briefs of their counsel, that the Burns operatives were brought

to Washington in order to make sure that no one else approached or tampered with the jury.

If these statements and testimony are true, and if any such anxiety in truth ever existed, why did not Sinclair or his counsel ask the court to confine the jury? It is a familiar practice in our criminal procedure; and was the practice followed in the earlier companion oil case, in which Doheny and Fall were tried on a like charge of having conspired to defraud the United States. Juries have been held together in the District of Columbia in the past and doubtless will be held together in the future.

Sinclair was represented by competent, capable and experienced counsel. If he were beset by these fears, why could not these counsel have had recourse to a practice long familiar in this jurisdiction and necessarily well known to them? By the simple expedient of keeping the jury together during the trial, all of Sinclair's alleged fears regarding malevolent influences could have been dispelled once for all.

Both the daily written reports of the Burns operatives and their testimony reveal without contradiction that the jury was not being subjected to any espionage save that of the Burns Agency. There is no instance of any juror ever having been trailed by employees of the Department of Justice; there is no instance of any juror's home having been visited by anyone save a Burns operative; there is no instance of any juror's relatives or friends being subjected to investigation and shadowing save by Burns operatives;

and finally, there is no instance of the encumbrances on any juror's home being investigated by anyone save a Burns operative. Furthermore, the handwritten reports of practically all of the operatives contain the statement that there is no one outside of a Burns operative shadowing a juror.

Now if the sworn answers and testimony of appellants, as well as the arguments of their counsel, are to be taken at face value (*i. e.*, if the real purpose of the "Washington operation" was to ascertain whether or not anyone else was shadowing these jurors or was seeking to tamper with them), it is manifest that appellants had their answer through the mouths of their own particular agents at the very inception of the trial. If the real purpose of the espionage was to find out if the jury were in danger of molestation on the part of the Government or of any of Sinclair's malevolent enemies, then the Washington operation might well have come to a complete stop upon the second or third day of trial. By that time appellants knew that the jurors were not being shadowed or tampered with by any other party.

It is most significant that the fact of all facts which appellants claim they were most eager to ascertain was considered of such little, trivial and insignificant import that it was not included in the carefully edited typewritten reports of the operatives. In editing and typing the daily handwritten reports for presentation to Day, all reference to the oft reported fact that no one else was trailing the jurors was deleted with

meticulous care. What, then, becomes of the contention of appellants that the sole object of the espionage was the protection of the jurors from tampering on the part of the Government or malevolent enemies of Sinclair; and that Sinclair and Day were most eager above all things to ascertain at the very inception of the Washington operation whether or not these jurors were in fact being followed.

In addition to the deletion of the important fact that the jury were not being shadowed, we have the further noteworthy fact that the "very bull-headed" juror Flora was never shadowed by the Burns operatives for an instant. Why is it that his home was never placed under surveillance? Why is it that he was not followed to his business appointments and his places of amusement? Why is it that his house was not visited? Why is it that his mortgages were not investigated, and why was he never subjected to the many other obnoxious features of this Washington operation?

What extraordinary divination enabled appellants to dispense with all espionage upon Flora? Why were not appellants apprehensive of the possibility of some malign enemy of Sinclair approaching this juror and corrupting him so as to prevent the possible acquittal of Sinclair? No possible ground for this exemption can be found in the contention of appellants that the jury were shadowed in order to prevent malign influences being brought to bear upon them. There is no answer for the deliberate withdrawal by

appellants of such protection for Flora save possibly this: The history attached to the jury list which counsel for Sinclair had in their possession at the time of the impaneling of the jury, and which Sinclair handed Day at the close of court on the first day of trial for the purpose of giving it to the Burns operatives, contained the very significant notation that Flora was a "very bull-headed" man. Flora was thus depicted as an obdurate and obstinate type, and for obvious reasons appellants wasted no time upon him.

What then was the real object and purpose underlying the Washington operation? The above mentioned facts and testimony disclose beyond all reasonable doubt that Sinclair did not have as his real object a simple scrutiny of the jurors. The Government charges, and the evidence convincingly substantiates the charge, that the jury espionage was carried on during the first week of trial for the purpose of making sure that the jury was not being shadowed by anyone else, so that appellants might thereafter carry on and accomplish with impunity their real object and purpose, to wit, the corruption of the jury, and in particular certain carefully chosen members thereof. **All doubt as to the alleged innocence and propriety of the surveillance is dispelled by the complete change in the character of the Washington operation during the second week of trial, which change is marked by a base and corrupt concentration of activities upon the three jurors Kidwell, Kern and Glasscock.**

Since the second day of the trial, Sinclair and Day had been studying with care and discussing each day the reports upon Kidwell, Kern and Glasscock. At the close of the first week of the trial, Sinclair is quoted by Day as saying that it would be a good idea "to find out if Kidwell and Kern were really substantial citizens" (R. 828). **It is uncontradicted that George P. Hoover, Esq., one of Sinclair's attorney's, had procured a descriptive list of the prospective jurors in order to assist him in the selection of a jury. This descriptive list gave full details as to the history of each juror. It therefore follows that Sinclair's attorneys knew full well the character of Kidwell, Kern and Glasscock at the time of their selection as jurors.**

Sinclair and his attorneys must have been fully satisfied with their characters at the time of the impanelling or else they would have challenged these jurors and not permitted them to remain in the jury box. Why should Sinclair suddenly, after a week of trial, begin to express agitation as to whether they were model subjects? The explanation of why the operatives suddenly concentrated upon Kidwell and Kern is highly improbable and ridiculously unplausible in view of their subsequent activities.

The descriptive jury list which Sinclair and his counsel had at the beginning of the trial and which was turned over to Ruddy by Day at Sinclair's direction, depicted Kidwell, Kern and Glasscock as follows:

Kidwell was described as a leather worker who

had been pretty wild as a boy "drinking and running around with rather a tough crowd" and who was still "a sport" although he had quieted down a little. Kern was listed as a bread wagon driver who was "quite a sport," who went to the races whenever he could, and who drank and took "a chance on any kind of a bet." Glasscock was described as a receiving clerk, living in extremely humble circumstances, who was "big, fat and lazy," who took "the easy side of life" and did "a lot of loose talking and cursing" and who had "no particular political or religious affiliations" and took "no pride in his personal appearance."

These descriptions of Kidwell, Kern and Glasscock afford abundant proof why appellants concentrated their efforts and activities upon these three jurors during the second week of trial. The three men were of lowly station and their background, their environment, their earning power and their personal shortcomings were such that they might prove easy prey to corruption.

Appellants had known for a week that the jurors were not being shadowed by government agents or by anyone else. An excellent opportunity was thus afforded to appellants to concentrate their efforts upon these three jurors with impunity. As a preliminary step, Ruddy proceeded to Philadelphia in order to connect "with other phases of the case." Just what these phases were is not disclosed in the record. One thing is certain, however, this trip was in no wise

connected with the fictitious purpose which appellants claim was behind the surveillance, namely, the ascertainment of whether or not anyone else was shadowing the jurors or endeavoring to tamper with them.

The first step in the concentration upon Kidwell was an effort to ascertain his views as to the trial. Day had heard that Kidwell had a brother who was a barber and expressing the opinion that all barbers were very garrulous, he requested Ruddy to have the brother shadowed. Ruddy detailed O'Reilly for the investigation.

Under the guise of a representative of the Health Department of the District of Columbia, O'Reilly proceeded directly to the home of juror Kidwell at 1637 U Street, S. E., and there talked with the juror's mother. The time of his visit is fixed at approximately 4.30 or 5 o'clock P. M., at which time it was reasonable to assume that juror Kidwell would not be in attendance in court since its daily sessions ordinarily concluded at about 3.30 in the afternoon.

Having ascertained from the mother the address of the Kidwell barber shop, O'Reilly proceeded directly to the Myrtle Hotel, where it was located and which O'Reilly knew was reputed to be "a sporting house." Upon arrival there, he entered the barber shop, and, using a suitable pretext, engaged the father of juror Kidwell in conversation, making some inquiry about a fictitious person by the name of Stewart. The report of O'Reilly on this visit not only

describes the Myrtle Hotel as one of ill-repute, but also contains the statement that racing slips were found in the back of the premises.

If we take at its face value Day's explanation of the occasion for O'Reilly's mission, it is manifest that the most vicious of criminal contempts was thereby committed. Day said, in effect, that barbers are very garrulous people and talk quite a bit and that therefore he wished to know whether the barber relative of juror Kidwell was talking promiscuously about the trial or in any way expressing "anybody's ideas about the trial" in the hearing of customers in the shop. **This confessedly amounts to a direct effort on the part of an agent of a defendant in a criminal case to ascertain, while such case is in progress, the sentiments of a juror sitting in that case as reflected in the casual utterances of a relative of said juror.**

No feature of our criminal procedure is stressed more emphatically or has a sounder foundation in reason, logic and experience than that of cloaking in impenetrable silence the sentiments, views and reactions of a juror from the time the case is first entrusted to him until the verdict is rendered. This is too elemental to admit of extended discussion. No one may speak to a juror with regard to the case. The juror may not express his views during the pendency of the case. The trial judge so warned the jury at the close of court on the first day of the trial.

Even on occasions when a jury is in apparent dis-

agreement and comes in for instructions or enlightenment, the court is always most careful to instruct the jury that while it is willing and eager to give them any assistance that might be required in any matter of law pertaining to the case, yet they must be most careful in putting their questions to the court to refrain from indicating in the slightest degree whatever any attitude they or any of them may have taken on the facts involved or the ultimate issue.

It is further inconceivable that there should be any serious argument on the question whether it is contempt for a private detective in the employ of a defendant in a criminal case to visit the home of a juror. A transaction of that character presents a serious affront to the dignity of the court. The machinery of our criminal law would fall and eventually collapse, if a court would give sanction to the proposition that private detectives employed by a defendant might visit the homes of jurors with impunity. A practice of this character contains so many implications of grave import to our judicial system that its inherent viciousness is manifest.

Appellants endeavored to show that O'Reilly did not know he was visiting the home of juror Kidwell, when he went to 1637 U Street, S. E. O'Reilly testified that he looked through the Washington City Directory for Kidwells living in Anacostia, the section of Washington in which he was directed by Ruddy to start his investigation; and that he found many Kidwells living in that part of the city. He

further testified that when he went directly to the above address he did not realize that was the home of juror Kidwell.

If O'Reilly did not know that he was going to the home of juror Kidwell, is it not uncanny that this home was the only Kidwell home visited by him. But the oral testimony of O'Reilly is convincingly refuted by his daily handwritten report of October 24, 1927 (R. 163). That report begins with the statement that O'Reilly made an investigation of juror Kidwell's brother under instructions received from Ruddy; and then come these significant words: "I went to the residence as given, after being unable to obtain any information nearby the house." Of course Ruddy had the correct address of juror Kidwell inasmuch as he had in his possession the descriptive list of jurors that Day had handed him at the commencement of the operation. That descriptive list bore the full name of juror Kidwell and his correct street address.

It is inconceivable that O'Reilly did not know the home address of juror Kidwell. Each day he had collected the daily handwritten reports showing the activities of the Burns operatives in the vicinity of that address. These reports told in detail various incidents occurring in Kidwell's immediate neighborhood; and embraced, *inter alia*, the narrow escape of operative Merritt from arrest in that vicinity by a police sergeant by reason of his apparently aimless loitering.

That the visit of O'Reilly to the home of juror Kidwell was not the innocent transaction that appellants claim is made manifest by the following significant words in O'Reilly's report of October 24, namely, "the brother of #5 in whom we are interested * * *."

The record disclosed that juror Kidwell returned to his home that evening at 6 o'clock, at which time his mother reported to him the visit of O'Reilly. Later in the evening, the mother again related the O'Reilly visit to the father in the presence of juror Kidwell. Would the enormity of this visit been aggravated had juror Kidwell been at home when O'Reilly came to the house under the guise of an employee of the District of Columbia? O'Reilly and his superiors must have realized that a visit at that hour of day might reasonably expect to find the juror at his home. More than an hour had elapsed since court had adjourned for the day.

Nevertheless, O'Reilly proceeded to the home of juror Kidwell, despite the danger of a possible encounter with him. If, in truth, he missed this juror, it does not abate in the slightest degree the depravity of his conduct and the conduct of those who sent him. If such a visit is not contempt, then the courts of this land must lend their approval to a practice inherently vicious and essentially inimical to the soundness of criminal administration.

According to O'Reilly's hand written report upon the conclusion of his conversation with the mother of

juror Kidwell, O'Reilly visited the barber shop of Kidwell's father and, using a suitable pretext, accosted him and asked him some questions about a fictitious person. It is reasonable to assume that the statement in O'Reilly's report that the barber shop was located in a hotel of ill-repute may be considered as a reference to facts which might lead his superiors to believe that the character of juror Kidwell and of his family might be such that a fertile field was readily available for the sowing of the seeds of corruption.

That the foregoing visit was considered important appears from the subsequent conduct of O'Reilly. Instead of merely filing next day a hand written report covering the visit, O'Reilly hurried back to the Wardman Park Hotel that evening and there reported verbally to his chief, Ruddy, in the presence of Day. The latter was standing within four or five feet of O'Reilly, while the visit was being narrated to Ruddy. Day testified that he overheard practically none of the conversation between Ruddy and O'Reilly (R. 829). It is significant, though, that that portion of the conversation which Day did hear was that "it was a disreputable barber shop up on a hill in a disreputable hotel" (R. 829). It is further significant that Day happened to be in that room on the return of O'Reilly for the purpose of making an unusual oral report to his chief.

In view of all the circumstances attendant upon O'Reilly's visit to the home of juror Kidwell and

the barber shop of his father, the government cannot accept the ingenious but incredible explanation thereof by Day. When a defendant of the power and wealth of Sinclair is on trial, facing the possibility of two years incarceration in the penitentiary, when private detectives in his employ are conducting malevolent espionage, when there is a juror who is described as "a sport," who has been pretty wild and has drunk and run around with rather a tough crowd in his youth, what is the only reasonable, intelligent and obvious inference that any man can draw from such a visit?

Only this inference is probable and reasonable, namely, that the visit was preliminary to and a part of a direct effort by a defendant on trial to reach that juror, to buy him, to bribe him, to corrupt him and to fix him so that the defendant might escape risk of imprisonment. This conclusion becomes even more irresistible in view of the testimony that (1) something had gone wrong in the trial and it looked very bad for Sinclair, (2) Sinclair had $200,000 to spend on the jury, and (3) Sinclair was going to "spend plenty of money to get out of this as he had to" (R. 618-20).

Equally sinister and venal are the activities of Day and the Burns operatives in investigating the financial responsibility of juror Kern and the encumbrances upon his home. The description which appellants and their counsel had of Kern at the inception of the trial revealed that he was a sport

who went to the races whenever he could and took a chance on any kind of a bet. Obviously such a man was not to be expected to meet his financial obligations on the meagre salary of a bread wagon driver.

Day testified that he believed that juror Kern was irresponsible and that he was most anxious to find out if there were any encumbrances on his property. This anxiety manifested itself during the first week of trial when Day asked a friend in the real estate business how to look up a mortgage. So anxious was Day to discover the irresponsibility of Kern that he not only arranged to have the Burns operatives investigate the encumbrances on Kern's home and the identity of the parties holding the same, but also he himself went to the real estate office of Hagner and Company and thereby ascertained that there was a substantial mortgage on the house of juror Kern which was held by a building and loan association.

The investigation of juror Kern did not rest with the discovery of this encumbrance. Two Burns operatives were detailed to trail his brother and, in addition thereto, an operative was placed on the trail of Vogt, his next door neighbor, who was a reputed petty grafter.

The sinister possibilities that beset a secret investigation during a trial into the financial obligations of an admittedly gaming juror of straitened circumstances are too many and too dangerous to admit of their countenance for a moment by a criminal court.

Likewise, the usage to which the information thus disclosed could be put by one with corrupt intent is too manifold and apparent to admit of discussion. One wonders, however, whether the encumbrance on the home of juror Kern played any part in the "something" that Ruddy promised "was going to break in the case over the weekend" of October 29th. The record contains the significant statement that appellants wished to ascertain if any encumbrances had been recently paid off on behalf of Kern. This indicates that they considered him corruptible.

Early in the trial, steps were taken to frame juror Glasscock in order to procure possible material for a mistrial or a new trial, if appellants should later find either contingency necessary. The trial judge had carefully charged the jury on the opening day of trial that they should not talk about the case nor should they read newspaper accounts thereof. Pursuant to instructions from Ruddy, McMullin on the third day of trial embodied in his daily report a false statement that juror Glasscock had purchased and read a newspaper intently during the noon recess that day.

Two days later Ruddy came to McMullin's hotel room and told him that "something had gone wrong in the case the day before" and that "it looked very bad for Sinclair." He thereupon gave McMullin an automobile license number and directed him to put the driver of an Oakland roadster with that license number in conversation with juror Glasscock at the Potomac Flying Field. Such a spurious meeting

was reported in McMullin's daily report for that day as having taken place at the Potomac Flying Field that afternoon.

The falsity of the report is now freely admitted by appellants. In addition, the testimony of juror Glasscock, of Mr. Lamb, Special Assistant to the Attorney General, who is the owner of the car bearing that license number, and of the garage man all bore uncontradicted witness to the falsity of the report.

Apparently it was not the intention of appellants to make use of these fabricated reports unless it became necessary to do so; in which event they were to be used as the basis for a mistrial or a new trial. Appellants were prevented from so using the fabricated reports by the unexpected government search of the headquarters of the Burns operatives at the Wardman Park Hotel on the morning of October 31st and the seizure of their reports and other documents.

But this capture afforded a new use for the spurious meeting of juror Glasscock with Mr. Lamb at the Potomac Flying Field on the afternoon of October 22nd. It afforded a ready basis for the false newspaper statement by William J. Burns that the only tampering with the jury was attributable to agents of the Government. This false statement was used to divert the unfavorable newspaper publicity from which the Burns Agency suffered after the declaration of the mistrial. It was also used

in an unsuccessful attempt to influence the trial judge and mislead him into believing that the Burns operatives and appellants were not chargeable with contemptuous conduct. We shall deal fully in the following section of this brief with the subsequent filing of false affidavits on behalf of William J. Burns to this end.

The framing of juror Glasscock has a further malign significance. The daily reports of the Burns operatives disclosed that Glasscock was in touch with his reputed friend Burr. Immediately thereafter, a Burns operative was instructed to ascertain if Burr had loose morals and if "he was capable of playing with a juror or approaching a juror." At the time this information was sought, appellants, of course, knew that the jury was not being shadowed or approached by anyone else. Strenuous efforts were made to get in touch with Burr; and not only were Burr and his wife called by telephone at his home but the cultivation of an acquaintance with a third party named Simmons was attempted as a possible avenue of approach to Burr through his business connections.

The foregoing concentration of activities upon those three jurors whose background, environment and habits were such that they might prove easy prey to those seeking to corrupt them disproves the contention of appellants that the espionage was solely for the purpose of ascertaining whether anyone else was following or tampering with the jury. As to

such a contention they had their answer in the negative a day or two after the beginning of the espionage. What, then, becomes of the contention of appellants that the present case is but one of surveillance.

It was not simple surveillance when O'Reilly went to Kidwell's house; nor was it simple surveillance when O'Reilly went from there to the disreputable barber shop of Kidwell's father. It was not simple surveillance when Day went to Hagner and Company to find out about the mortgage; nor was it simple surveillance when O'Reilly went to the Recorder of Deeds in the District Building to ascertain the encumbrances on Kern's house. It was not simple surveillance when operatives scoured the neighborhood of Kern's home in search of information and trailed his brother and his next door neighbor Vogt. It was not simple surveillance when Ruddy instructed McMullin to frame juror Glasscock on two separate occasions; nor was it simple surveillance when operatives endeavored to get in touch directly and indirectly with Burr and to ascertain if he was susceptible of playing with a juror or approaching a juror.

All of the above activities of the Burns operatives during their week of concentration on jurors Kidwell, Kern and Glasscock disclose that the appellants, having first ascertained for a certainty that the jury was not being shadowed by anyone else, thereupon proceeded to work upon these three jurors in a manner that leaves no doubt but that their final object

and purpose was to corrupt them and to make them amenable to the sinister and venal aims of Sinclair. It is not surprising that appellants seek to divert attention from these activities and thus escape criminal responsibility for their actions by constantly reiterating there was no contact with any juror and therefore the reasonable tendency of such activities are to be disregarded.

This Court is now faced with the same problem that faced the court below, namely, whether or not it can give and will give its approbation to activities and transactions such as these. Before such approbation can be given, this Court must first find that (1) espionage upon a jury is lawful, even though it ranges over every moment of a juror's waking hours and carries with it the constant threat of disclosure and the resultant disturbance of the serenity of his mind and his freedom from distraction which are the essential privileges of a juror; (2) the home of a juror may be visited with impunity by private detectives in the employment of a defendant in a criminal case; (3) efforts may be made with impunity by private detectives in the employment of a defendant in a criminal case to ascertain the sentiments of a juror during the trial; (4) the private and financial affairs of a juror may be investigated with impunity by private detectives in the employment of a defendant in a criminal case, while that juror is sitting; (5) friends of a juror may be approached with impunity in an effort to learn whether they have

loose morals and are susceptible of approaching the juror and (6) grave misconduct on the part of a juror may be fabricated with impunity in order to provide possible material for a mistrial or a new trial.

The government submits that if this Court and the other courts of the United States should for even a moment lend their approval to these activities, there would necessarily be injected into our system of law administration such sinister and venal practices that the sanctity and sturdiness of our institutions would at once be imperilled, if not destroyed.

In considering whether the facts in the present case constitute contempt, it is important to bear in mind the fact that the jury is as integral a part of the court as the presiding judge and that it is entitled to just as much protection as the judge. This was expressly recognized by the Court of Appeals for the District of Columbia in the case of **McCaully v. United States, 25 App. D. C. 404 (1905)**, wherein it is said (p. 414):

> "* * * **Every juror is part of the court wherever he is.** Under our common law the jury is as much a part of what may be designated as the machinery of the administration of justice as is the judge, and a corrupt attempt to influence the jury, or any individual member of it, is an offense differing only in degree from a similar attempt to corrupt the judge. **Judge and jury are component parts of the court.** An attempt upon the integrity of the jury, or upon the integrity of any indi-

vidual juror, is a direct attack upon the court; and the court is entitled to protect itself from all such attacks by the methods which the common law has established for the purpose, namely, by the way of summary proceedings for contempt of court.

"Now, if it be true, as it seems to us to be, that an attack upon the integrity of an individual juror is an attack upon the integrity of the body to which he belongs—for it only requires the corruption of one to destroy the efficiency of the whole—and such attack therefore is a direct attack upon the court, how can it reasonably be argued that the act has not been done in the presence of the court? We scarcely know how it could come nearer home to being an obstruction to the administration of justice."

For the purposes of the present argument, let it be assumed for the nonce that the acts complained of in this case were directed towards the presiding judge instead of the jury.

Would it not be contemptuous, if private detectives got the judge up in the morning and put him to bed at night? Would it not be contempt of court, if every time the judge boarded a street car a private detective was with him? Would it not be contempt of court, if the neighborhood of the judge's home was constantly patrolled by an agent or agents of a defendant in a criminal case wherein the judge was sitting? Would it not be contempt of court, if the mortgages on a judge's home were investigated by private detectives during the pendency of a case?

Would it not be contempt of court, if efforts were made to ascertain the sentiments of a judge regarding a case before he had rendered his opinion? Would it not be contempt of court, if the neighborhood of the judge's home were raked as to the habits and susceptibility of his friends to receiving graft? Would it not be contempt of court, if the judge's wife or sons or daughters were trailed by agents of a defendant during the pendency of a case in which he was sitting? Would it not be contempt of court, if the espionage began in the very court room and the judge became aware of the vicious surveillance?

Would not the foregoing activities have a reasonable tendency to obstruct justice and to interfere with his free and unfettered disposal of the case on its merits and under the law? If these things were done to a presiding judge, surely that would constitute contempt. Jurors are entitled to the same protection as the judge. Therefore, if such activities would constitute contempt in the case of a judge, surely they would likewise constitute contempt in the case of a jury.

Under the law of criminal contempt as declared by this Court, it is not necessary that the jury should realize the espionage in order to convict appellants of criminal contempt. This is the doctrine laid down in the case of

Toledo Newspaper Co. et al. v. United States 247 U. S. 402 (1918).

The facts and decision have been previously stated at pages 45-47 of this brief. The opinion by Chief Justice White carefully points out that the defamatory publications had never reached the eyes or the attention of the trial judge nor had the defamatory newspapers ever been circulated in the court room. There was a complete absence of proof that the judge was ever cognizant of the contemptuous publication.

However, in the present case, there are many facts which would indicate beyond any doubt that the espionage had penetrated the consciousness of the jurors. Juror Kidwell testified without contradiction that a number of jurors, including Herzog, Holmes and Kern had discussed the subject of shadowing in the jury consultation room, while the jury had been sent out from the court room during an argument on a question of law. The two women members of the jury, Mrs. Bailey and Miss Heaton, were also present during the discussion.

This discussion, which lasted five or ten minutes, indicates that the jurors were conscious of the fact that some surveillance was going on. Surely such a discussion indicates that they knew there was something mysterious and intangible surrounding them. It further indicates that appellants were bringing by their espionage a distraction into the minds of the jurors that interfered with the proper, fair and decent administration of justice.

Even though the law does not require the government to show that the espionage by appellants regis-

tered on the minds of the jurors, still this discussion is now presented to this Court for the express purpose of showing that the Washington operation did penetrate their consciousness and did actually obstruct justice in this case.

If a juror is discussing being shadowed in the middle of the case his mind is not the mind that the law contemplates when he is put on the jury to try well and truly a certain case. That mind has been subjected to a distraction which interferes, impedes and distracts him in carrying out the duty the law requires him to fulfill.

The law imposes, as a cardinal principle, the proposition that where a man is sworn to try well and truly the issues in a case he must try the case on the facts as produced on the witness stand and according to the law as its comes from the lips of the judge on the bench. He will not be able to try well and truly that case if he feels that someone is subjecting him to a close, intimate and objectionable surveillance. He can not try well and truly that case in the unfettered and untrammeled manner that the law demands if he is conscious of such an espionage.

The law does not contemplate that the case shall be tried in that fashion. The law does not admit of a jury being subject to such obnoxious distractions. The law does require that the case shall be tried free of all obstructions and all distractions which may be calculated to interfere for a moment with the pure and unsullied administration of justice.

Juror Herzog testified in answer to the question whether or not he was aware of being followed, that while not aware, he had a suspicion thereof. He further testified that while driving home from court one day he noticed a car which he believed was following him. The car turned into the street where Herzog lived and parked on the side opposite Herzog's home. Herzog thereafter looked out of the window to see if the car was still there. Why was he doing that unless there was passing through his mind at the time of the trial a conviction or suspicion that he was being shadowed?

Furthermore, juror Herzog told on the stand about a man he observed hanging around outside of his place of business; and that subsequently, after the revelation of the shadowing operation, he saw operative O'Reilly and thought that O'Reilly was the man he saw hanging about at that time.

Why was Herzog noticing people hanging around his place? Why was it that Herzog was watching to see if cars were following him or was observing cars that stopped in front of his house? Why were jurors engaging in a conversation with other jurors with regard to shadowing unless they had some reason to know that they were being followed? This espionage had registered on their consciousness, and having registered, was inevitably impeding them in the discharge of their duties as jurors.

This uneasiness and suspicion on the part of juror Herzog is further evidenced by an episode reported by operative Knowles on October 24, 1927. That

episode disclosed that Herzog and his companion were suspicious of Knowles who was parked in a car in their immediate vicinity and that the companion was so aroused that he left Herzog and passed by operative Knowles twice observing him closely and scrutinizing him suspiciously.

Assembling the various facts with regard to Herzog, the conclusion is inescapable that this harassing, vicious, obnoxious espionage was forcing into the mind of this juror an uneasiness and a suspicion that the law does not countenance.

Kidwell testified that he saw a man whom he subsequently recognized as operative Merritt board the same street car on which Kidwell was riding during the course of the trial. He also told of seeing agent Klein enter a near-beer saloon as he was leaving it; and that he kept Klein under observation as Klein crossed the street and up until the time that Klein passed out of sight.

It matters nothing whether or not juror Kidwell knew that the Burns operatives were following him. It matters nothing whether or not he knew that detectives in the employ of appellants were following him. It does matter greatly, however, that a juror had noticed the presence of these two men during the course of the trial who were subsequently identified as Burns operatives. It demonstrates that another juror was conscious of the espionage. It shows that another juror was subjected to these distractions which the law demands he should not be required to suffer or endure.

Juror Kidwell, after he had been accosted in Judiciary Square by some mysterious stranger who sought his assistance in getting into the court room and who made inquiry as to what the juror thought of the trial, came into the jury room in the court house where he encountered Mrs. Bailey and Miss Heaton, two of the jurors. The conversation between the three was not related on the witness stand, but there did get into evidence a statement by Kidwell that a conversation was had between them upon the subject of coming into the court house for the purpose of keeping out of trouble.

Operative O'Neill relates in his daily report that juror Goucher acted in such a manner on Sunday, October 23rd, as to disclose that Goucher was cognizant of the espionage. O'Neill felt so perturbed about the espionage that he called up O'Reilly to advise him of the probability that juror Goucher had detected the surveillance. O'Reilly directed O'Neill to resume the trailing and do the best that he could under the circumstances.

Despite the assertions by appellants that the Burns operatives were instructed not to bother or to accost jurors and that they were directed to desist from the shadowing if the jurors became conscious of the fact, yet it is noteworthy that O'Neill was not relieved from the duty of shadowing juror Goucher, even after this occurrence.

The foregoing episodes clearly establish that the espionage had penetrated the consciousness of the jurors and had disturbed their serenity of mind in a

manner not contemplated by the law. Although such realization of the espionage by the juror was not necessary under the decision of this Court in the Toledo case, *supra*, yet it is but another factor justifying the conviction of appellants upon the charge of criminal contempt.

In conclusion we submit that the activities of the Burns operatives during their two weeks of espionage upon the jury disclosed beyond peradventure that their activities were highly improper in object and were aimed to corrupt the jury; and that such activities not only reasonably tended to obstruct justice, but did in fact, as found by the trial judge, obstruct the trial of the Sinclair-Fall conspiracy case and largely cause its abrupt termination in a mistrial on November 2, 1927. We further submit that the jury espionage had penetrated the consciousness of the jurors and thereby tended to impede and interrupt the free and untrammeled discharge of their important functions as triers of fact.

C. Complicity of William J. Burns in the criminal contempt.

In the separate brief filed on behalf of William J. Burns, it is argued that there is no evidence to support his conviction of criminal contempt. This argument is based upon the alleged lack of any proof that Burns had any knowledge of or connection with (1) the jury espionage and (2) the procurement and submission of the false McMullin affidavit. This necessitates a review of all the evidence showing his connection with the Washington operation.

The contention that Burns had no knowledge of or connection with the jury espionage is based upon his testimony that his first knowledge thereof was on November 1, 1927, when a New York newspaper man telephoned to ask him for a statement regarding the Washington operation. This testimony, however, need not be accepted at its face value, since the record contained other testimony that justified the fact inference that Burns and Sinclair had met in advance of trial and arranged for the possible espionage upon the jury.

Furthermore, his actions, utterances and attitude after the mistrial all point to his consciousness of guilt. These actions, utterances and attitude will hereafter be fully considered in our discussion of his knowledge and connection with the procurement and filing of the false McMullin affidavit.

The record disclosed that William J. Burns came to Washington on October 12th and left on October

13th. He accounted fully for his time on the 12th and on the morning of the 13th; but carefully concealed his activities during the remainder of that day. He did let drop the fact that he could be reached at the Washington office of the Burns Agency during the remaining portion of the day.

Burns was thus free for half a day to meet his old client, Sinclair, who had come to Washington on October 10th and was spending the whole week there preparing for the approaching trial of the Sinclair-Fall conspiracy case. That Burns and Sinclair must have availed themselves of the opportunity so to meet readily appears from the subsequent manner and method of the employment of the Burns Agency for the espionage.

When the Burns Agency was employed on October 18th to espy upon the jury, this employment was accomplished by extremely brief and closely guarded long-distance telephone conversations, in which neither the name of the case nor the word "jury" was used. The employment was effected through Day and not Sinclair. The telephone conversations were put through to private residences, whenever possible; and the meeting between Day and Ruddy was likewise at a private residence.

In view of the brevity and reserve of the conversations by telephone and in person, and in view of the fact that Day was at all times an unknown person to the Burns Agency, it is more than a fair fact inference that there must have been some prior

arrangement about bringing the Burns operatives to Washington. In view of the further fact that Burns and his old client Sinclair were in Washington just before the trial, and in view of the failure of Burns to account for more than a portion of his time, the conclusion is irresistible that the pre-arrangement must have been between Burns and Sinclair.

There is direct and convincing proof that Burns had full knowledge of and was directly connected with the filing of the false McMullin affidavit after the declaration of the mistrial on November 2, 1927.

On that day William J. Burns personally telephoned his Washington attorney, Thomas Lodge, in order to avert the notoriety regarding the Burns Agency that was then emanating from the Grand Jury proceedings in Washington. The next evening Mr. Lodge was present in the room of Ruddy at the Wardman Park Hotel and assisted in the preparation on that occasion of the false McMullin affidavit. The following morning, November 4th, Mr. Lodge proceeded to the chambers of Justice Siddons and handed him the McMullin affidavit. Mr. Lodge then and there stated that he represented the Burns people and was presenting the affidavit on their behalf. He also made use of the name of William J. Burns in that connection, and told Justice Siddons that the affidavits were for his information.

On the evening of November 5, 1927, William J. Burns conferred with W. Sherman Burns and Ruddy

in New York City about the Washington operation generally.

After Burns had appeared before the Grand Jury in Washington on November 8th, he conversed with a group of newspaper men standing in the hall outside and told them that he had filed with Justice Siddons two affidavits disclosing that the Government had been guilty of the only jury tampering. That same day Burns went to the Union Station in Washington in order to meet McMullin who was returning from Philadelphia. During the course of that day Burns told McMullin to stick to his false story regarding the meeting of juror Glasscock and Mr. Lamb at the Potomac Flying Field and he "would be well taken care of."

After McMullin had appeared before the Grand Jury on November 9th Burns again assured McMullin that he would be well taken care of and instructed him to go out to the Potomac Flying Field and look over the lay of the land. He also instructed McMullin to get a look at Lamb's automobile. McMullin testified that at the time of the preparation and execution of his false affidavit Ruddy told him that William J. Burns wanted the affidavit made for the client, and that it would be pretty bad for McMullin if he did not go through with it.

The foregoing testimony is more than ample to show the complicity of William J. Burns in the preparation and filing of the false McMullin affidavit and to support his conviction for criminal con-

tempt. That portion of the testimony which is based on the disinterested sworn statements of the secretary to Justice Siddons, and of the two newspaper men, is not in dispute and its credibility is not attacked by counsel for William J. Burns. The balance of the testimony, which depends upon the credibility of Government witness McMullin, is strenuously attacked in the separate brief for William J. Burns.

The attack upon the credibility and veracity of McMullin's testimony is based entirely upon his prior criminal record. The Government freely admits that McMullin procured employment with the Philadelphia office of the Burns Agency by using a false name, and that he was convicted of passing a bad check for which he served time in an Ohio penitentiary. Despite this bad record the fact remains that when it came to betraying his Government McMullin balked and disclosed to Government counsel the activities of the Burns operatives, thereby preventing the corruption of the jury. The facts that he disclosed to Government counsel in this regard were subsequently proved in every detail by the reports and documents seized by the Government under the search warrant.

We desire to call attention at this point to a specious argument that is advanced by counsel for appellants with reference to McMullin's disclosures to Special Counsel for the United States prior to the issuance of the search warrant and the seizure of the records and documents of the Burns operatives

on October 31, 1927. Counsel argue that the jury espionage was innocent and proper because Special Counsel for the United States acquiesced in and tacitly approved of the activities of the Burns operatives for a week or ten days before taking any action thereon.

This argument misapprehends the purpose underlying the apparent inactivity of Government counsel. They were deeply perturbed by the information brought to them by McMullin at the close of the first week of trial and were greatly troubled over the corrupting possibilities of the surveillance. After due deliberation they concluded that the information disclosed by McMullin did not warrant Special Counsel in forcing a mistrial at that stage, but that they should await developments and first learn just what turn the surveillance might take.

To that end, they requested McMullin to remain at his duties under the Washington operation and to advise Special Counsel, if possible without detection, as to the further activities of the Burns operatives. When advised by McMullin of the concentration upon jurors Kidwell, Kern and Glasscock and of the activities of the Burns operatives in connection therewith, Special Counsel at once realized that such action could have for its sole purpose the corruption of the jury and, in particular, the three members just named. The time for summary action had arrived; and consequently a search warrant was issued and the records and documents of the Wash-

ington operation were seized. Thereupon, Special Counsel submitted to the trial judge affidavits regarding the activities of the Burns operatives; and the following day a mistrial was declared.

It is thus manifest that Special Counsel in no wise gave their approbation to the jury espionage. On the contrary, as soon as the appellants disclosed their hand and the corrupt character of the espionage was unmistakably revealed, Special Counsel acted promptly and thereby prevented the successful completion by appellants of their sinister efforts to bring about a miscarriage of justice.

Returning now to the credibility and veracity of McMullin's testimony, it is apparent that we have in McMullin the example of a man with a bad record who "came clean" and told the truth to Government counsel when he realized that his country was being betrayed. His credibility must of course largely depend upon his manner of testifying on the witness stand. This is a matter peculiarly within the knowledge of the trial judge; and his confidence in the veracity of McMullin's testimony should not be lightly set aside on appeal. Moreover, his findings of fact based upon McMullin's testimony are conclusive, if sustained by substantial evidence, as they are.

There are certain other factors in the present case that support the truthfulness of his testimony. Burns undoubtedly knew of the spurious character of the McMullin affidavit. It is not reasonable or plausible to assume that the former head of the

Bureau of Investigation of the Department of Justice would believe that a Special Assistant to the Attorney General of the United States would be going to a flying field outside the District of Columbia to meet a juror in any case.

However, the servants of William J. Burns had gone too far in the matter of concocting material for a mistrial or a new trial. Such fabricated material had been seized by the Government under the search warrant; but Burns saw in the spurious McMullin report of October 22, 1927, material for a countercharge which would divert the public gaze from the iniquitous practices of the Burns operatives and fasten public attention on what apparently was a performance on the part of the Government far more sinister than the espionage his operatives admitted. The opportunity thus presented was too strong to resist.

Further evidence of Burns' knowledge of the falsity of the McMullin affidavit is found in the manner of its presentation to the court and the motive that underlay such presentation.

The spurious affidavits were not filed by Daniel Thew Wright, Esq., counsel for Day, although Wright had largely prepared them the previous evening. They were not filed by counsel for Sinclair. Instead they were filed by Thomas Lodge, the personal attorney of William J. Burns and with whom Burns had recently talked about averting the undesirable publicity that followed the mistrial.

Furthermore, the spurious affidavits were not brought to the attention of the United States Attorney nor to the Chief Justice of the Supreme Court of the District of Columbia. This would have been the normal procedure and must have been known to Mr. Lodge, a former Assistant United States Attorney. A most anomalous procedure was followed. On November 4th Mr. Lodge handed the affidavits to Justice Siddons in chambers. The mistrial in the Sinclair-Fall conspiracy case had been declared by Justice Siddons on November 2nd; and he was obviously occupied at the time with considering what appropriate action should be taken with reference to the activities and practices that had been disclosed in the affidavits upon which he had relied in discharging the jury and terminating the trial.

What were the motives that underlay the filing by William J. Burns of the spurious affidavits with Justice Siddons? It was primarily the desire to halt if possible the unfavorable newspaper publicity which the Burns Agency was then enjoying. The agency bearing his name had carried on a jury espionage which was largely responsible for the disgraceful mistrial of one of the leading criminal causes of the day. The activities of that agency were being flaunted in public print to such an extent that Burns most obviously was feeling the pinch of such undesirable notoriety.

Besides, W. Sherman Burns, the son of William J. Burns and the secretary and treasurer of the

agency, had confessedly sent these operatives to Washington. It was impossible to assume that W. Sherman Burns would escape prosecution for his part in the plan; and possibly William J. Burns might become involved in the same prosecution. If, however, a counter-attack could be launched making it appear that the Government had transgressed even more so than the Burns operatives, then the Burnses would be in a more favorable position to defend themselves.

Burns was also deeply interested from a monetary point of view in extricating the Burns Agency from its unenviable plight. Ninety-four per cent. of its capital stock then stood in the name of his wife and the remaining six per cent. was owned by his sister and son. Such ownership shows that Burns had a very definite and specific monetary reason for his attempt to smudge the issue and tar the Government with the same brush with which the agency bearing his name was being smeared.

His eager and truculent statements both in the newspapers and to the reporters, that the Government had been guilty of the only jury tampering, were not the statements of one interested in the truth, but were rather the desperate words of one striving to extricate himself from a most trying and difficult situation. They are in keeping with the lavish attention shown McMullin by Burns upon his arrival in Washington later that day.

This lowly private detective, McMullin, was personally met at the Union Station in Washington by

William J. Burns and W. Sherman Burns. They put him into a cab and brought him to the law offices of Mr. Lodge. The chief topic of conversation, both at the station, in the cab and at the office of Mr. Lodge, was the flying field episode. When met at the station McMullin was told by William J. Burns to stick to his story and "I will take care of you." This assurance was repeated again and again.

Why was all this attention on the part of William J. Burns and W. Sherman Burns, and others, lavished upon a humble private detective, and why was the conversation practically confined to the flying field affair unless William J. Burns was preparing McMullin to bear up under investigation and adhere to his fictitious yarn. This is perhaps best indicated by his answer to McMullin's fears over not being able to identify Mr. Lamb. Burns told McMullin that he need not worry since his report of October 22, 1927, did not purport to describe Mr. Lamb but merely gave the number of his automobile.

Further evidence of the attempt of William J. Burns to bolster up the false report of McMullin is furnished by his instructions to McMullin, after the latter had appeared before the Grand Jury. After again assuring McMullin that he would be well taken care of, Burns instructed McMullin to return to Washington and to go out to the Potomac Flying Field in order to look over the lay of the land. He also directed McMullin to get a look at Lamb's automobile.

William J. Burns admitted that he told McMullin to go to the Potomac Flying Field and look it over, but, as Burns contends, for the purpose of locating someone who could identify McMullin as having been there on the afternoon of October 22nd. He did not deny, however, that he had given instructions to McMullin regarding the identification of Lamb's automobile.

The above mentioned evidence is more than adequate to support the finding of the trial judge that William J. Burns was implicated in the criminal contempt and to sustain his conviction therefor. In this regard it should be noted that an appellate court does not consider the weight of the evidence but simply ascertains whether the findings of fact are supported by any competent evidence and whether these evidentiary facts had any reasonable tendency to sustain the conclusion of guilt there under. This was held not only in the Toledo case *supra*, but also in the cases of **Tjosevig v. United States, 255 Fed. 5 (1919) (C. C. A. 9); Stewart v. United States, 236 Fed. 838 (1916) (C. C. A. 8); Binkley v. United States, 282 Fed. 244 (1922) (C. C. A. 8); and Kelton v. United States, 294 Fed. 491 (1923) (C. C. A. 3).**

The suggestion has been made by counsel for William J. Burns that his client was not on trial at the time the false affidavits were filed and had no interest of any kind or character to subserve which would induce him to have deposited such spurious papers with the trial judge; and that justice was in no way obstructed or impeded by the filing of

the false McMullin affidavit. We have previously pointed out that William J. Burns was not the disinterested and detached party that his counsel would have this Court believe. There were several matters pending before the court at that time that were susceptible of being obstructed by the filing of the false affidavits.

There were before the trial court: first, the Sinclair-Fall conspiracy case which still remains on the docket at this time insofar as the defendant Fall is concerned; second, the grand jury investigation into the jury espionage conducted by the Burns Agency, such proceedings being conducted, of course, on behalf of the Supreme Court of the District of Columbia; and third, the fact that the Sinclair-Fall conspiracy case had resulted in a mistrial, largely due to the jury espionage so that the Supreme Court of the District of Columbia was at that time faced with the necessity of taking appropriate measures in the premises to safeguard and protect its dignity.

Even though the false affidavits failed of their object, they were nevertheless intended to obstruct and impede the foregoing court proceedings; and the law is clear that the submission of a spurious affidavit constitutes contempt, regardless of its success or failure. The court will not permit itself to be made the butt for every wilful kind of misrepresentation. The wilful filing of a false affidavit before any court at any time is contemptuous to that court and is most strongly subversive of its dignity.

This principle of law of criminal contempt is so well established that it is hardly necessary to do more than refer to the leading case of

In re Steiner, 195 Fed. 299 (1912).

The defendant in that case was convicted of criminal contempt for having prepared and presented false affidavits that were used in opposition to a motion for a preliminary injunction. The opinion by Circuit Judge Lacombe contains the statement that **"there is no essential difference between 'obstructing the administration of justice' by tampering with a juror or a witness, or by preparing, verifying, and securing the presentation of a false affidavit, intended to influence the action of a court."**

The conviction was affirmed by the Court of Appeals for the Second Circuit in **202 Fed. 419 (1912).**

Counsel for appellants complain that prejudicial error was committed by the admission in evidence, over their objection, of testimony by McMullin that Ruddy told McMullin before the preparation and execution of his false affidavit on Thursday night, November 3rd, that William J. Burns wanted the affidavit made for the client (R. 623). It is contended that such testimony was rank hearsay and therefore inadmissible.

We submit that this evidence was competent and admissible as part of the *res gestae* under the holding of this Court in the case of

United States v. Gooding, 25 U. S. 460 (1827).

The defendant in that case was indicted under the

Slave Trade Act of April 20, 1818. The trial court admitted in evidence the declarations of the master of the ship, which the defendant owned, that the vessel had been engaged in the slave trade and had made a good voyage. Objection was raised as to the admissibility of these declarations and the judges of the Circuit Court of Maryland, in which the prosecution was had, were divided in opinion upon its admissibility. This question of evidence was certified to this Court for final determination; and in holding the evidence admissible, Justice Story said (pp. 468-70):

> "It is to be observed, that, as preliminary to the admission of this testimony, evidence had been offered to prove that Gooding was owner of the vessel, that he lived at Baltimore, where she was fitted out, and that he appointed Hill master, and gave him authority to make the fitments for the voyage, and paid the bills therefor; that certain equipments were put on board peculiarly adapted for the slave trade; and that Gooding had made declarations that the vessel had been engaged in the slave trade, and had made him a good voyage. The foundation of the authority of the master, the nature of the fitments, and the object and accomplishments of the voyage, being thus laid, the testimony of Captain Coit was offered as confirmatory of the proof, and properly admissible against the defendant. It was objected to, and now stands upon the objection, before us. **The argument is, that the testimony is not admissible, because, in criminal cases, the declarations of the master of the vessel, are not evidence to charge the owner with an offense; and that the doctrine**

of the binding effect of such declarations by known agents, is, and ought to be, confined to civil cases. We cannot yield to the force of the argument. In general, the rules of evidence in criminal and civil cases are the same. Whatever the agent does, within the scope of his authority, binds his principal, and is deemed his act. It must, indeed, be shown, that the agent has the authority, and that the act is within its scope; but these being conceded or proved, either by the course of business, or by express authorization, the same conclusion arises, in point of law, in both cases. Nor is there any authority for confining the rule to civil cases. **On the contrary, it is the known and familiar principle of criminal jurisprudence, that he who commands, or procures a crime to be done, if it be done, is guilty of the crime, and the act is his act.** This is so true, that even the agent may be innocent, when the procurer or principal may be convicted of guilt, as in the case of infants or idiots, employed to administer poison. **The proof of the command or procurement, may be direct or indirect, positive or circumstantial; but this is matter for the consideration of the jury, and not of legal competency.** So, in cases of conspiracy and riot, when once the conspiracy or combination is established, the act of one conspirator, in the prosecution of the enterprise, is considered the act of all, and is evidence against all. Each is deemed to consent to, or command, what is done by any other, in furtherance of the common object. Upon the facts of the present case, the master was just as much a guilty principal as the owner, and just as much within the purview of the act, by the illegal fitment.

"The evidence here offered was not the mere declarations of the master, upon other occasions, totally disconnected with the objects of the voyage. **These declarations were connected with acts in furtherance of the objects of the voyage, and within the general scope of his authority as conductor of the enterprise.** He had an implied authority to hire a crew, and do other acts necessary for the voyage. The testimony went to establish, that he endeavored to engage Captain Coit to go as mate, for the voyage then in progress, and his declarations were all made with reference to that object, and as persuasives to the undertaking. **They were, therefore, in the strictest sense, a part of the res gestae, the necessary explanations attending the attempt to hire.** If he had hired a mate, the terms of the hiring, though verbal, would have been part of the act and the nature of the voyage, as explained at the time, a necessary ingredient. **The act would have been so combined with the declarations, as to be inseparable, without injustice.** The same authority from the owner which allows the master to hire the crew, justifies him in making such declarations and explanations as are proper to attain the object. Those declarations and explanations are as much within the scope of the authority, as the act of hiring itself. **Our opinion of the admissibility of this evidence proceeds upon the ground, that these were not the naked declarations of the master, unaccompanied with his acts in that capacity, but declarations coupled with proceedings for the objects of the voyage, and while it was in progress.** * * *"

Much of the foregoing quoted language from the opinion in the Gooding case is peculiarly apposite to the facts of the present case. The agency and authority of Ruddy are not in dispute. The statement that William J. Burns wanted the affidavit made was used by Ruddy to induce the preparation and procurement of the false McMullin affidavit. Clearly it was part of the *res gestae* regarding that false affidavit. Moreover, Burns subsequently made that affidavit his act and deed, both by his own words and the declarations of his counsel. Not only did he expressly ratify its preparation and execution but also he accepted the benefits temporarily accruing therefrom.

We submit, therefore, that the declaration of Ruddy to McMullin was competent and admissible against the principal, William J. Burns. This declaration affords further proof of Burns' knowledge of and connection with the false McMullin affidavit, if there could possibly be any need therefor.

In conclusion we submit that the record contains abundant and convincing proof that William J. Burns had full knowledge of the falsity of the McMullin affidavit and was instrumental in procuring its filing with Justice Siddons; and that, therefore, the conviction of William J. Burns for criminal contempt should be affirmed. We further submit that there is sufficient in the record to justify the fact inference that William J. Burns and Sinclair met in Washington in advance of trial and then arranged for the employment of the Burns Agency in case the jury in the Sinclair-Fall conspiracy case should not be held together.

D. No error was committed in excluding evidence of an alleged practice of jury shadowing on the part of Department of Justice agents.

Appellants complain that the trial court erred in refusing to admit evidence that agents of the Department of Justice had frequently shadowed juries in the past. This evidence was proffered for the purpose of either exculpating or mitigating their contemptuous conduct. It was rightly excluded on both grounds.

The proffered testimony could not have exculpated appellants or given any extenuation to their criminal contempt. It had no bearing on the question before the court. It would be a fair analogy for counsel representing the defendant in a robbery, rape or grand larceny case to attempt to offer evidence to the court during the trial or at the time of the sentence to show that other persons had committed robbery, rape and grand larceny. If it were to be offered for the purpose of showing that appellants believed they had a right to do the things they did then we have an answer thereto in the familiar Latin maxim that ignorance of the law excuses no one.

The admission of the proffered testimony would have been a most illogical and startling innovation in the administration of criminal law. It would in fact break down the due administration of that law and offer a too ready defense for every criminal in that there are few if any crimes that have not been committed by some other defendant on some other occasion. Had appellants not been in such desperate

circumstances we venture that their counsel would never have been forced to advance such an absurd contention.

Moreover, there is this important distinction between agents of the Department of Justice and private detectives such as the Burns operatives. The former are officers of the law; and therefore it is entirely proper and fitting that they should protect the administration of justice by the courts of which they are properly members. Like any other officer of the law, they and they alone are the proper parties to protect a jury from molestation and sinister influences.

The Burns operatives are, on the contrary, but private detectives and are in no sense officers of the law. They have no function whatever to perform with reference to the courts and the administration of justice. It is neither their duty nor their privilege to safeguard a jury.

E. No error was committed in receiving evidence showing conversations among the jurors upon the subject of being shadowed.

Despite the insistent statements in all the briefs of appellants that no juror was aware of the espionage, it is curious that there should be an assignment of error based on the admission in evidence of certain conversations among the jurors on the subject of being shadowed. This testimony was relevant and material to the Government case because it showed that the activities of the Burns operatives had in fact penetrated the consciousness of the jurors and had in fact afforded material for a distraction that the law does not contemplate shall enter the juror's mind.

Juror Kidwell testified that a number of the jurors including Herzog, Holmes and Kern, had discussed for five or ten minutes the subject of shadowing in the jury consultation room during the trial. This discussion was corroborated by the two women jurors, Mrs. Bailey and Miss Heaton. Juror Herzog testified that he had a suspicion that he was being followed. Various episodes were narrated by juror Herzog, juror Kidwell, operative Knowles and operative O'Neill, disclosing specific instances of where a juror was aware of his surveillance.

Such testimony was clearly competent. It revealed the state of mind of the jury during the trial and also brought to light the further fact that the deliberations of that body were being trammeled and

obstructed by the Washington operation. The record disclosed independently of this testimony that no one else was trailing the jurors save the Burns operatives; and therefore it was admissible in gauging the inherent effect of the espionage and showing that jurors had on several occasions become conscious of that fact.

The very nature of espionage makes it impossible for the juror to know who it was that was shadowing him. Naturally, detectives are not prominently placarded with signs indicating their employer. This concealment makes the vice of jury surveillance most insidious. For instance, the resentment that naturally follows the discovery of the surveillance may well be directed against the innocent and not the offending party. It may well be that the jurors in the present case were prejudiced against the Government's cause by the vicious practices of the Burns operatives in the employ of appellants. This is an unfair risk that every innocent party must needlessly undergo in any jury espionage.

In considering the alleged erroneous rulings of the trial judge in the present case, it should always be borne in mind that this case was heard without a jury, that the trial judge is presumed to act only on proper evidence, and that on appeal the judgment will not be reversed so long as there is properly admitted evidence to justify it. This principle of law is based on **Section 269** of the **Judicial Code** (U. S. C. A. tit. 28, Sec. 391), which reads, in part:

> "• • • **On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties.**"

The law of criminal contempt has always acknowledged and followed the above proposition of law. In the recent case of

Oates v. United States, 233 Fed. 201 (1916) (C. C. A. 4),

Circuit Judge Woods, in affirming a conviction for contempt in violating a temporary restraining order, said (p. 205):

> "Indeed, had the admission of incompetent testimony been the only matter involved when the cases were here before, this court would not have been justified in sending the cases back for the correction of that error; **it would have been our duty to review the record and decide whether there was sufficient competent testimony to support the judgments. When a judge hears a case without a jury, he is supposed to act only on proper evidence, and if on review it is found that the evidence properly admitted justifies the decree it ought to be affirmed, and if not it ought to be reversed.** • • • In all these and many other cases the rule laid down by Chief Justice Marshall in Field v. United States, 9 Pet. 202, 9 L. Ed. 94, has been followed:

"'As the cause was * * * not tried by a jury, the exception to the admission of evidence was not properly the subject of a bill of exceptions. But if the district court improperly admitted the evidence, the only effect would be that this court would reject that evidence, and proceed to decide the cause as if it were not on the record. It would not, however, of itself constitute any ground for a reversal of the judgment.'

"The wisdom of the rule that a new trial is not to be granted because of the admission of incompetent evidence, when the trial is by the judge without a jury, is forcibly illustrated by the cases now before us. The testimony had been taken by the district judge, and he had made his findings on what he regarded the competent testimony. Had this court determined that certain testimony should have been excluded and the cases sent back for a new trial, the parties would have been put to the expense and trouble of producing all of the witnesses before the same judge, who would have excluded the testimony found by the appellate court to be incompetent. **It is manifest that the same result was effected by striking from the record as it stood all of the incompetent evidence and leaving the competent evidence for consideration.** Any impression made by the incompetent evidence could not have been better effaced by a new trial than by excluding it from consideration."

We submit that the conversations among jurors regarding shadowing was competent in that they disclosed the jurors were aware of the espionage.

This interference with the serenity of mind in which the law cloaks the jury while discharging their functions as triers of the facts constituted but another ground in support of the conviction of appellants for criminal contempt. Even if it be held that this testimony was incompetent, no reversible error was thereby committed inasmuch as there was abundant other testimony to justify the conviction.

F. No error was committed in admitting evidence of conversations between juror Kidwell and his parents during the period of jury service.

Appellants object to the admission in evidence of the conversation between juror Kidwell and his mother within an hour or two after the visit of operative O'Reilly to the Kidwell home. The mother first told juror Kidwell about the visit and later repeated her account thereof to her husband when he came home that evening,—juror Kidwell, the son, being also present.

The relevancy of these conversations is not open to discussion. When a private detective goes to the home of a juror in a criminal trial, describes himself as a representative of the District of Columbia Board of Health, states that he has some papers to be signed with regard to the barber shop owned by the juror's father and then rather curiously asks the mother of the juror where the barber shop is located; surely the subsequent narration of that visit to the juror and its repetition later in his presence, is competent and admissible not only upon the subject of whether or not the jury espionage is impinging upon the mind of a juror and providing unwarranted distraction (particularly when during the course of the trial some of the jurors are discussing the subject of being shadowed and watched), but also upon the subject of the reasonable tendency of such a visit to obstruct and interfere with the due administration of justice.

No valid objection can be raised to the admission of this testimony and other testimony of like nature upon the ground of hearsay. These conversations were not offered for the purpose of proving the truthfulness of the facts then narrated, but were on the contrary merely offered to show that the discussion had taken place. Such evidence is in every sense a verbal act and a part of the *res gestae;* and is therefore recognized by all courts as outside the hearsay rule.

G. No error was committed in admitting evidence of juror Kidwell's conversations in the National Museum grounds and near the door of the court house.

Juror Kidwell was permitted to tell on the witness stand how some stranger approached him during the course of the trial while he was sitting on a bench near the National Museum and acted in a strange and suspicious manner. He also told of how some stranger once approached him in the court house grounds and asked about getting in to hear the trial and then asked juror Kidwell what he thought of the case. Juror Kidwell was not able to identify either operative O'Reilly or operative Stewart as these two men.

Counsel for appellants assert that the admission of this evidence constitutes reversible error. We submit that this evidence was pertinent and properly received by the trial judge. In the first place, it is entirely in keeping with the uncontradicted efforts of the Burns operatives to ascertain the views of juror Kidwell regarding the trial. In the second place it is highly significant that the daily hand written reports of the Burns operatives, who were then so closely shadowing every movement of juror Kidwell during his waking hours, contain no reference to either episode. This omission can be explained in but one way, namely, that these experimental approaches to juror Kidwell were carried on by someone known to or in the employ of the Burns Agency, while the

Burns operative shadowing the juror lay in wait to see that no one else was observing the attempt upon his subject.

The mother of juror Kidwell testified that her son had discussed these episodes with her at their home (R. 508). This is but further proof of the distraction and interference with a juror's mind resulting from the espionage, and also discloses a further attempt to ascertain the views of a juror regarding the merits of the cause being tried before him. All the above testimony is clearly admissible as verbal acts within the *res gestae*.

H. The trial court properly excluded the testimony of operative O'Reilly regarding the conversation on the occasion of his visit to the home of juror Kidwell and to the barber shop of his father.

While under direct examination by the Government, operative O'Reilly was asked at no time by the Government to relate any part of any conversation that he had either at the home of juror Kidwell or at the barber shop of Kidwell's father. On cross examination by counsel for appellants, O'Reilly was asked to state what was said on each occasion (R. 428). The Government thereupon objected to the question upon the ground that such interrogation was outside the scope of direct examination. This objection was sustained and O'Reilly was not permitted to narrate his conversations with the mother and father of juror Kidwell.

Counsel for appellants now assign as error the exclusion of this testimony. We submit that the evidence was properly excluded. There can be no question but that the cross examination of a witness may not go beyond the bounds of the direct examination. This is a rule of evidence too well established to require any citation of authorities.

The exclusion of O'Reilly's testimony was in no sense prejudicial to the cause of appellants. Besides, counsel for appellants could have readily called O'Reilly as a witness for the defense and procured

the testimony in that manner. Such is the invariable practice of our courts. Furthermore, the conversation between the mother of juror Kidwell and O'Reilly was placed in evidence by the Government when Mrs. Kidwell was herself called to the stand and testified at length regarding the visit of operative O'Reilly to the home of juror Kidwell.

I. The trial court properly refused to dismiss the petition and discharge the rule either at the close of the government's case or at the conclusion of the evidence.

Appellants complain that the trial court erred in refusing to dismiss the petition and discharge the rule at the close of the case in chief of the United States and again at the close of the whole evidence. This alleged error is based upon the contention of appellants that the jury espionage and the activities of the Burns operatives pursuant thereto did not obstruct or tend to obstruct the due administration of justice.

This fallacious contention has been fully answered under the second section of the argument in this brief (pp. 42-85, *supra*); and it will serve no useful purpose to repeat any portions of that argument here. The Government bottoms its cause upon the ruling of this Court in the Toledo case, *supra*, that the test and criterion for criminal contempt is the reasonable tendency of the offending acts to obstruct the due administration of justice; and also upon the fact finding, amply supported by an abundance of competent evidence, that the instant jury espionage not only reasonably tended to obstruct justice but had also actually obstructed it and thereby largely caused the declaration of the mistrial in the Sinclair-Fall conspiracy case on November 2, 1927. In this regard we quote the following significant language from the opinion of the trial judge (R. 854-55):—

> **"* * * I cannot escape the conviction, therefore, that respondent Sinclair, respondent Day,**

respondent Sherman Burns and respondent W. J. Burns, have been perhaps in different degrees, all involved, more or less directly involved, in the establishment of this surveillance, a surveillance which I have already announced in my opinion constituted an obstruction to the administration of justice by this court. If it had not been for that surveillance, from aught that appears in this testimony, there never would have been a mistrial in this case, a surveillance that at least in part, together with the publication of the affidavit regarding it, but at least in part, necessitated a mistrial."

III. CONCLUSION.

We respectfully submit that the uncontradicted proofs in this case show that the jury espionage conducted by appellants was not a simple surveillance in order to protect the jurors from improper influences, but had as its sole object the corruption of individual members of that body after appellants had first ascertained that the jurors were not being shadowed and hence that their sinister and venal activities might thereafter be pursued with impunity and without fear of detection. We further submit that the jury espionage reasonably tended to and did actually interfere with justice, as found by the trial judge. We also submit that the false affidavits subsequently filed in justification of the jury espionage were intended to influence and mislead the court and in that manner obstruct justice; and that therefore the procurement and filing of these false affidavits constitutes in itself a further contempt of court. We finally submit that no prejudicial error was committed by the trial judge in his various rulings upon the admission or exclusion of evidence.

We therefore respectfully request that the present appeal be dismissed and the judgment of conviction of appellants for criminal contempt be affirmed.

Respectfully submitted,

OWEN J. ROBERTS,

Special Counsel.